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No. 97-1802-CFX

itle: David Conn and Carol Najera, Petitioners
v.
Paul L. Gabbert

Docketed:
May 7, 1998

Court: United States Court of Appeals for
the Ninth Circuit

Entry Date

Proceedings and Orders

May 4 1998	Petition for writ of certiorari filed. (Response due August 14, 1998)
May 18 1998	Waiver of right of respondent Paul Gabbert to respond filed.
May 19 1998	DISTRIBUTED. June 4, 1998
Jun 1 1998	Response requested.
Jun 9 1998	Order extending time to file response to petition until August 14, 1998.
Aug 14 1998	Brief of respondent Paul Gabbert in opposition filed.
Aug 26 1998	REDISTRIBUTED. September 28, 1998
Sep 10 1998	Reply brief of petitioners David Conn, et al. filed.
Oct 5 1998	Petition GRANTED. limited to the following questions: (1) Does a prosecutor violate an attorney's rights under the Fourteenth Amendment by causing the attorney to be searched at the time his client is testifying before a grand jury? (2) If the answer to the first question is "yes," was such a right on the part of the attorney clearly established in March, 1994? SET FOR ARGUMENT February 23, 1999. *****
Nov 18 1998	Joint appendix filed.
Nov 18 1998	* Joint appendix in three volumes filed.
Nov 18 1998	Brief of petitioner David Conn, et al. filed.
Nov 19 1998	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Dec 17 1998	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Dec 21 1998	Brief of respondent Paul Gabbert filed.
Jan 19 1999	Reply brief of petitioners David Conn and Carol Najera filed.
Jan 22 1999	CIRCULATED.
Feb 22 1999	Record filed.
Feb 22 1999	Record filed.
Feb 23 1999	ARGUED.

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No. _____

OFFICE OF THE CLERK

In The Supreme Court of the United States
October Term, 1997

DAVID CONN and CAROL NAJERA, *Petitioners*,

vs.

PAUL L. GABBERT, *Respondent*.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented by this petition consists of a cascading series of sub-issues, as follows:

1. Is there federally protected right for a witness testifying before a grand jury to consult with his or her attorney at will outside of the grand jury room, such that interference with such consultation would form the basis for an action pursuant to 42 U.S.C §1983 *by the attorney* for violation of his constitutionally protected right to practice his profession?

2. If so, is the right to practice a profession (such as law) limited to the basic right to seek and maintain employment in that profession, or does it encompass the day-to-day activities of that profession as well (such as consulting with a particular client on a particular occasion), such that that interference with such day-to-day activities would form the basis for an action pursuant to 42 U.S.C §1983 by the professional for violation of his or her right to practice his or her profession?

3. If the right to practice a profession does encompass the day-to-day activities of that profession, is the proper test for resolving whether there has been an undue and unreasonable interference with that right to determine whether the state action interfered with the professional's ability "to practice according to the highest standards of that profession?"

4. If all of this is so, was this right, in this form and scope, so clearly established that no reasonable public official, such as the two deputy district attorneys involved here, could have believed that their actions were lawful?

PARTIES TO THE PROCEEDING

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- A: OPINION of the United States Court of Appeals for the Ninth Circuit, filed December 8, 1997
- B: ORDER of the United States District Court for the Central District of California, filed September 30, 1994
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- D: S E P A R A T E S T A T E M E N T O F UNCONTROVERTED MATERIAL FACTS AND CONCLUSIONS OF LAW of the United States District Court for the Central District of California, filed October 3, 1995
- E: JUDGMENT of the United States District Court for the Central District of California, filed October 3, 1995
- F: ORDER of the United States Court of Appeals for the Ninth Circuit, filed February 2, 1998

CITATIONS FOR OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 131 F.3d 793 (9th Cir. 1997). The order denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* (Appendix F) was not reported. The opinions of the District Court (Appendices B, C, D, and E) are unreported.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals filed its opinion on December 8, 1997. That Court denied the petitioner's petition for rehearing and suggestion for rehearing *en banc* on February 2, 1998. 28 U.S.C. §1254(1) confers jurisdiction on this Court to review on a writ of certiorari the opinion of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the respondent pursuant to 42 U.S.C. §1983, which at the time this action was filed read as follows:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, an Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

The respondent alleges that the petitioners deprived him of rights secured by the Fourth and Fourteenth Amendments, the relevant parts of which read as follows:

FOURTH AMENDMENT: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

FOURTEENTH AMENDMENT (Section 1):
"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Procedural History

Respondent filed suit in the United States District Court for the Central District of California on June 23, 1994 against the petitioners and others asserting two claims for relief arising under 42 U.S.C. §1983. (1 Excerpts of Record on Appeal [ER] 1, 17, 20) The basis for jurisdiction of the respondent's action in the District Court was 28 U.S.C. §§1331 and 1343. (1 ER 1)

On September 30, 1994, the District Court granted in part and denied in part the petitioners' motion to dismiss made pursuant to Federal Rules of Civil Procedure rule 12(b)(6), dismissing all of the respondent's claims except for his Fourteenth Amendment claim for interference with his right to practice his profession. (See Appendix B, page B-21.) On February 8, 1995, the District Court denied respondent's motion for leave to file a First Amended Complaint to add a state law cause of action under California Penal Code section 1524. (See Appendix C, pages C-2 and C-5.) On October 3, 1995, the District Court granted summary judgment in favor of the petitioners and against the respondent. (See Appendices D and E.)

The respondent appealed to the United States Court of Appeals for the Ninth Circuit. On December 8, 1997, the Court reversed the summary judgment granted in favor of the petitioners. It also reversed the dismissal of the respondent's Fourth Amendment claims as to petitioner David Conn. (See Appendix A, page A-25.) On February 2, 1998, the Court denied the petitioners' petition for rehearing and rejected the petitioners' suggestion for rehearing *en banc*. (See Appendix F.)

The Underlying Facts

Traci Baker testified as a witness for the defense at the highly publicized first trial of Erik and Lyle Menendez. Thereafter, the District Attorney's office learned of the existence of a letter purportedly written by Lyle Menendez to Ms. Baker that was described as a "script for her testimony", and began an investigation. (1 ER 50) In response, Baker, on or about February 11, 1994, hired respondent Paul Gabbert, a veteran criminal defense attorney, to represent her. (1 ER 4)

On Thursday, March 17, 1994, Baker was served with a subpoena to testify before the grand jury on the following Monday, March 21, 1994. (1 ER 6) The subpoena required Baker to bring with her "any correspondence [sic] from Lyle Menendez." (1 ER 27) On Friday, March 18, 1994, Gabbert's ex parte application on behalf of Baker to shorten time for the hearing of a motion to quash the subpoena was denied. (1 ER 7)

On March 18, 1994, Det. Leslie Zoeller of the Beverly Hills Police Department, the investigating officer for the Menendez murder case, obtained a warrant to search the apartment belonging to Baker for any correspondence from Lyle Menendez or related materials. (1 ER 31-33) Det. Zoeller, accompanied by petitioners David Conn and Carol Najera, Deputy District Attorneys working on the Menendez case, served the search warrant on Baker at her apartment on March 18th. Upon being served with the search warrant, Baker voluntarily stated that "all the things that you're looking for are with my attorney." (2 ER 478)

On Monday, March 21, 1994, Gabbert and his client appeared as noticed for Baker's testimony before the grand jury. (1 ER 9) Based on a conversation that he had with Gabbert at the courthouse, Conn came to the conclusion that

Gabbert had in his possession the documents requested in the search warrant. He then asked his secretary and Det. Zoeller to add to the existing warrant a request to search Gabbert. (2 ER 417-419) Det. Zoeller obtained second search warrant, this time authorizing a search of both Gabbert and Baker for "any and all correspondence between Tracy Baker and Lyle Menendez." The warrant provided that the search of appellant was to be conducted by a special master, Elliot Oppenheim. (1 ER 44-45)

While Gabbert and his client were waiting in the grand jury's witness room, Det. Zoeller served the search warrant on the appellant. After Oppenheim was introduced to the appellant, Gabbert himself stated "We'll need a private room." (2 ER 352) He and Oppenheim then went to a private room where the special master conducted his search. (1 ER 56) Conn and Najera then entered the grand jury room. Det. Zoeller was then called to testify as a witness before the grand jury, and after his testimony concluded, Baker was called to testify. (2 ER 400-401) Conn and Najera remained in the grand jury room during the course of both Det. Zoeller's and Baker's testimony. (1 ER 279, 285)

Upon being asked the first question of her examination by Najera before the grand jury, Baker requested to speak with her attorney, which request was granted. (2 ER 515) Upon exiting the grand jury room, Baker looked for Gabbert, but did not see him. So she asked a woman who was there if she knew where the respondent was. (2 ER 380) The woman, Conn's secretary, went over to the room where Gabbert was being searched by Oppenheim and informed him that his client wished to speak with him. (2 ER 507-508) Gabbert responded that:

"I can't talk to her right now," words to that effect. 'I'm being searched.'

And she says, 'She has to talk to you right now.' She either says, 'Because she has to go back in the grand jury' or this was clear in the context that it was most urgent.

And I said, in effect, 'That's tough. They created this situation. They can wait as long as it takes.'" (2 ER 355-356)

Baker was able to see Gabbert and believed that they communicated. She felt that he advised her to assert her Fifth Amendment rights. (2 ER 383-384) Baker returned to the grand jury room, and, when the (first) question was repeated to her, she responded, "Based on the advice of my counsel, I respectfully decline to answer the question because my answer might tend to incriminate me." (2 ER 516) Based on that response, both Conn and Najera believed that Baker had in fact conferred with her attorney. (2 ER 280, 286)

When Najera then asked the witness a second question, Baker again asked to speak with her attorney, and she was again permitted to do so. (2 ER 516) Baker exited the grand jury room and again was unable to see the respondent. But this time she did nothing to locate Gabbert and simply waited outside the grand jury room. Finally, she was told she could not wait any longer and had to return to the grand jury room. (2 ER 388)

When she returned before the grand jury and the second question was repeated to her, Baker responded, "Again, based on the advice of my counsel, I respectfully decline to answer the question because my answer might tend to incriminate me." (2 ER 517) Based on that response, both Conn and Najera again believed that Baker had in fact conferred with her attorney. (2 ER 281, 287)

Baker was then asked whether she had brought with her the documents identified in the subpoena. When she again asked to speak with her attorney, Conn advised the foreperson of the grand jury that it appeared to be time to consult with the presiding judge to determine whether a contempt citation should be issued against the witness. The proceedings were recessed for ten minutes to permit the consultation and Baker was excused. (2 ER 517-518) When she exited the grand jury room for the recess, she found that Gabbert was now present. (2 ER 389)

Following the search of the respondent by Oppenheim (which did not result in the seizure of any items by the special master, although Gabbert voluntarily provided Oppenheim with two photocopied pages of a letter from Lyle Menendez to Baker), Gabbert had returned to the anteroom outside the grand jury room. There, he was allegedly approached by Conn, who advised him that since Oppenheim had determined "'that none of the items in your briefcase are privileged'", Det. Zoeller was going to conduct a second search of him. (2 ER 359) No items were seized pursuant to this second search, after which Gabbert proceeded to another courtroom to represent Baker at a preliminary contempt hearing. (2 ER 400, 520) No ruling was made at that time but instead the matter was set for a further hearing, which apparently never took place and the contempt proceedings against Baker were dropped. (2 ER 542)

REASONS FOR GRANTING CERTIORARI

As noted in the Question Presented, the issue on this petition is not a simple question of the propriety of a straightforward explicit holding by the Court of Appeals. Rather, it is the Court's decisions on four sub-issues that led to a finding that there was a triable issue as to whether the respondent had a viable claim under the Fourteenth Amendment against the petitioners for their alleged interference with his right to practice his profession. In order to meaningfully discuss those four sub-issues, and why this Court should grant certiorari to review them, it is best to begin by "deconstructing" the Court of Appeals decision to understand the interplay of those four issues.

1. THE COURT OF APPEALS' HOLDING ON RESPONDENT'S FOURTEENTH AMENDMENT CLAIM IS MUCH BROADER THAN THE COURT ADMITS TO IN ITS OPINION

The Court of Appeals, in its opinion, wrote that "[w]e hold that Gabbert had a clearly established right to pursue his profession without undue and unreasonable governmental interference and that no reasonable prosecutor or police officer could have believed that the worst of this conduct was lawful." (Appendix, A-13) However, this statement does not fully set out the holdings of the Court of Appeals in regard to the respondent's Fourteenth Amendment claim.

The Court of Appeals first rejected out-of-hand the notion that petitioners Conn and Najera are entitled to absolute immunity (see *post*, page 22, footnote *), and then analyzed whether they were entitled to qualified immunity.

The Court of Appeals stated that the constitutional right at issue here was that "the Fourteenth Amendment protects an individual's right to practice a profession free from undue and unreasonable state interference". (Appendix, A-11) However, the term "practice" can mean two different things in this context, either the basic matter of engaging at all in a particular profession, or the day-to-day transaction of that profession. Given the Court of Appeals' findings, and the arguments contained in the opinion, it is clear that the Court of Appeals was using the term "practice" in the *second* sense. Therefore, the specific constitutional right that the Court of Appeals determined was at issue here -- and therefore found to exist -- is that the Fourteenth Amendment protects an individual's right to engage in the day-to-day activities of his or her profession free from undue and unreasonable state interference.

Next, the Court of Appeals stated that "[t]he unusual facts of this case preclude 'the very action in question' to be clearly established in our case law" (Appendix, A-12), but nonetheless found that the right was clearly established because "long-standing precedent establishes the importance of the attorney-client relationship during a client's grand jury testimony." (Appendix, A-12 through A-13)

"[A] witness has the right to consult with her attorney outside the grand jury room. This right to assistance is clearly established in this and other circuits. The witness's clearly established right to assistance, however, cannot be exercised if government officials unnecessarily interfere with an attorney's ability to provide that advice.

A constitutional right may be clearly established 'both by common sense and by

precedent.' Both clearly establish that the right to practice a profession necessarily includes the right to practice according to the highest standards of that profession. ... Common sense necessarily leads to the conclusion that an attorney has the right to practice his profession in privacy and freedom from unreasonable intrusion by 'waiting outside the grand jury room' during his client's testimony. Therefore, we hold that Gabbert had the clearly established right to practice law free from undue and unreasonable governmental interference." (Appendix, A-13; emphasis added, citations omitted.)

The Court of Appeals thus decided that, given the constitutional right it had found for individuals to engage in the day-to-day activities of their professions without unreasonable interference, *any public official should have known*, through the use of simple common sense, that attorneys have a clearly established constitutional right to wait outside a grand jury room while their clients testify within.

The term "outside" can also have two meanings in this context. It can mean directly outside the door, i.e. the location where the witness would necessarily encounter the attorney the moment the witness stepped outside of the grand jury room. Or the word can simply mean the opposite of "inside", i.e. a location reasonably accessible to the witness that is not inside the grand jury room, a location which need not necessarily be directly outside the jury room door itself.

Since Gabbert was in fact accessible to Baker during her testimony before the grand jury and she in fact would have been able to consult with him but for *his* refusal to speak with her (see *ante*, pages 5-6), it is clear that the Court

of Appeals is using the term "outside" in the first sense. In other words, it appears that the Court of Appeals found that an attorney has a clearly established constitutional right to wait *directly outside the door* to the grand jury room during the entire time his or her client testifies inside. However, to be charitable, it will be assumed that what the Court of Appeals actually meant was that attorneys have a clearly established constitutional right to be *immediately* available, as opposed to merely being reasonably accessible, to their clients outside the grand jury room during the time the clients testify inside. (See Appendix, A-17, asserting that an attorney's right to practice his or her profession is violated when he or she is prevented "from offering legal assistance to the client in the very matter *and at the very moment* for which the lawyer was retained." [emphasis added])

Having set out the "clearly established" parameters of the "constitutional right" it found to be at issue here, the Court of Appeals proceeded to apply its findings to the facts of this case, to determine "whether a reasonable official could have believed the conduct at issue was lawful under the clearly established law" (Appendix, A-14), noting that it was to "decide whether the officials' actions were objectively reasonable under the facts and circumstances, *without regard to their underlying intent or motivation*." (Ibid.; emphasis added.) The Court of Appeals then held that:

"The only *apparent* reason to have [the execution of the search warrant on Gabbert and his client's grand jury appearance] occur at the same time was the prosecutors' *desire* to prevent Gabbert from communicating with his client. . . . [¶] The prosecutors chose ... [to execute] the search warrant on Gabbert at

almost the exact time Baker was being haled into the grand jury room. *The plain and intended result* was to prevent Gabbert from consulting with Baker during her grand jury appearance. These actions were not objectively reasonable, and thus the prosecutors are not protected by qualified immunity from answering Gabbert's Fourteenth Amendment claim." (Appendix, A-14 through A-16; emphasis added, footnotes omitted.)

In reaching this conclusion, the Court of Appeals did not find to be of any significance, and indeed did not even address, the point that Baker in fact was not "prevented" from consulting with Gabbert. (See *ante*, pages 5-6, 10-11.) In light of this, it is clear that the Court of Appeals found the supposed actions of the prosecutors objectively unreasonable not because they *prevented* Gabbert from consulting with Baker, as the opinion's language would suggest, but rather because the Court of Appeals found that those actions "unduly and unreasonably *interfere[d]*" with (Appendix, A-17) rather than prevented, Gabbert's ability to consult with Baker.

This interpretation is supported by the Court of Appeals' rejection of "the prosecutors' argument that their actions were objectively reasonable because they had no reason to know that Baker did not, in fact, consult with Gabbert when she left the grand jury room." (Appendix, A-16, fn. 5.)

"It is true that, upon Baker's return to the grand jury room, she invoked her privilege against self-incrimination on 'the advice of counsel.' Baker's prepared statement,

however, does not make the prosecutors' actions objectively reasonable. At best, *the prosecutors had to know that Gabbert was distracted from giving his full attention and advice to Baker. This distraction prevented Gabbert from practicing his profession 'according to the highest standards.'* [Citation.]" (Ibid.; emphasis added.)

Thus, the basis for the Court of Appeals' determination that the prosecutors' alleged misconduct was objectively unreasonable becomes clear. The Court of Appeals found that the defendants' actions unduly and unreasonably interfered with Gabbert's ability to consult with Baker *because those actions distracted him from giving his full attention and advice to his client, thereby preventing Gabbert from practicing his profession "according to the highest standards."*

2. THIS CASE IS THE FIRST ONE TO FIND THAT THE RIGHT TO PRACTICE ONE'S PROFESSION ENCOMPASSES THE DAY-TO-DAY ACTIVITIES OF THAT PROFESSION

At issue in this case was not Mr. Gabbert's ability to practice the profession of law. It was not his ability to practice a particular type of law. It was not his ability to represent certain types of clients. It was not even his ability to represent a particular client in a specific case. It was the alleged interference with his ability to provide legal assistance to one individual client on a specific occasion in the course of his overall representation of that client in a criminal matter. The petitioners are not aware of any other

case in which the recognized right to practice own's profession has been taken to such extremes, and such a finding seems to be at odds with the thrust of the decisions of this Court in this area.

In *Board of Regents v. Roth*, 408 U.S. 564, 575 (1972), an assistant professor at a state university claimed that the decision not to rehire him after his first academic year infringed on his Fourteenth Amendment rights. This Court held, among other things, that "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another", citing to its earlier decision of *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895-896 (1961).

In *Cafeteria and Restaurant Workers Union*, this Court found that denial of a security clearance for an employee on a military base, effectively terminating her employment, did not impact the employee's "right to follow a chosen trade or profession. [Citations.] [She] remained entirely free to obtain employment as a short-order cook or to get any other job, ... All that was denied her was the opportunity to work at one isolated and specific military installation." (*Id.* at 895-896.) The Court contrasted this situation with three other cases, in which an applicant was denied permission to sit for the New Mexico state bar examination because of his past membership in the Communist Party (*Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957)), in which a physician was denied a certificate to practice medicine (*Dent v. State of West Virginia*, 129 U.S. 114 (1889)), and in which a cook, a legal resident alien, sought to prevent his likely firing pursuant to a state law that mandated that all employers of more than five persons were required to maintain a workforce that was 80% citizen (*Truax v. Raich*, 239 U.S. 33 (1915)).

Unlike the case then before the Supreme Court, those earlier decisions involved situations where the petitioner was either entirely prevented from working in his or her chosen profession (*Schware* and *Dent*), or effectively prevented from working in any profession at all (*Truax*). That was not the situation at issue in this case, which is closer factually to those in *Board of Regents* and in *Cafeteria and Restaurant Workers Union*, which involved plaintiffs who were denied only the opportunity to continue in one particular position with one particular employer, but remained free to pursue his or her profession by seeking other positions with other employers. Here, Gabbert did not suffer even that minimal deprivation.

In *Meyer v. State of Nebraska*, 262 U.S. 390, 400-401 (1923), the petitioner was convicted of violating a statute which prohibited teaching modern foreign languages to children who had not yet passed the eighth grade. This Court reversed, finding that the "[p]laintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth]- amendment. ... [T]he Legislature has attempted materially to interfere with the calling of modern language teachers, with opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own." Unlike the situation in the present appeal, the State of Nebraska was seeking to entirely forbid a professional from engaging in at least a portion of his or her practice.

None of these cases involved the day-to-day activities of the practice of a profession. There clearly is a difference between entirely depriving someone of the right to participate in a particular field of endeavor and simply engaging in actions that might interfere with the specific manner in which

that participation occurs. The former goes to the heart of the liberty interests protected by the Fourteenth Amendment and obviously should be subject to oversight by the federal courts.

But is it really appropriate, as the Ninth Circuit has now decided, to require the federal courts to micro-manage the States' day-to-day relationships with its professionals? (And the present case clearly cannot be limited to attorneys, but logically must apply to *all* professionals.) We are not dealing here even with a pattern of individual slights whose cumulative effect is to substantially interfere with an attorney's overall ability to engage in the practice of his profession. At issue here is a *single* incident, with a specific and limited impact on the respondent. Does that truly impact the liberty interests of the Fourteenth Amendment, such that it justifies "making it into a federal case"? In light of this Court's decisions in *Board of Regents v. Roth* and *Cafeteria and Restaurant Workers Union*, the answer clearly should be "no".

Accordingly, unless this Court wants to see a host of civil rights actions brought on the basis of alleged state interference with the day-to-day activities of professionals, it must grant this petition and reverse the Court of Appeals.

3. **THIS COURT HAS NOT FOUND THERE TO BE A RIGHT OF WITNESSES TO CONSULT WITH AN ATTORNEY WHILE THEY ARE TESTIFYING BEFORE A GRAND JURY, AND THERE IS NO GOOD REASON WHY SUCH A RIGHT SHOULD BE RECOGNIZED**

In its opinion, the Court of Appeals found that "a witness has the right to consult with her attorney outside the

grand jury room. This right to assistance is clearly established in this and other circuits." (Appendix, A-13) It was on the basis of this allegedly clearly established right that the Court concluded that the petitioners here should have known that their supposed interference with Mr. Gabbert's ability to assist his client violated a clearly established right. But the case law does not support the Court of Appeals' conclusion that this right even exists.

The Court of Appeals cited to *United States v. Mandujano*, 425 U.S. 564, 581 (1976). But in that case, this Court did *not* hold, as the Ninth Circuit incorrectly states, that "a witness has the right to consult with her attorney outside the grand jury room." This Court merely noted that the prosecutor offered the witness the option of leaving the grand jury room to consult with counsel. It did not hold that the prosecutor was *obliged* to make such an offer. This Court's citation to *Mandujano* in *United States v. Williams*, 504 U.S. 36, 49 (1992) cites to the case for the proposition that the Sixth Amendment right to counsel does *not* attach when a witness is required to appear before a grand jury, making it unclear how *Mandujano* could possibly stand for the proposition that there is a right to consult with one's attorney during the grand jury proceedings, but no right to *have* an attorney in the first place.

The Courts of Appeal of the various circuits have not clarified the situation. The First Circuit, in *In re Grand Jury Proceedings*, 859 F.2d 1021, 1024 (1st Cir. 1988) merely notes that "courts generally recognize a witness's right to consult with an attorney outside the grand jury room", citing solely to *Mandujano*. The Second Circuit, in *United States v. Schwimmer*, 882 F.2d 22, 27 (2nd Cir. 1989) confusingly explains *Mandujano* as providing that "a grand jury witness who had a right to the assistance of counsel could not insist that his attorney accompany him in to the grand jury room",

leaving open the question of *when* a grand jury witness has the right to assistance of counsel. The Fourth Circuit, in *In re Special Grand Jury No. 81-1*, 676 F.2d 1005, 1010 (4th Cir. 1982) notes that "in many circuits [a witness] has the right to consult with his attorney outside the grand jury room ..."

The Eighth Circuit affirmatively asserts that "witnesses are entitled to have their counsel outside the room and to consult with their counsel whenever necessary." (*In re Matter of Grand Jury Subpoena*, 739 F.2d 1354, 1357 (8th Cir. 1984).) The Ninth Circuit also recognizes such a right. (See the opinion below, at Appendix, A-13, and *United States v. Plache*, 913 F.2d 1375, 1380 (9th Cir. 1990); but see *In the Matter of the Grand Jury Subpoena Issued to David Z. Chesnoff, Esq.*, 62 F.3d 1144, 1146 fn.2 (9th Cir. 1995) ["Perry has no legal or constitutional entitlement to counsel of his choice during a grand jury investigation."].)

Given that this Court has strongly suggested that the Sixth Amendment right to counsel does not attach to grand jury proceedings (see *U.S. v. Williams, supra*, 504 U.S. at 49), it is hard to understand how the mere procedural right of consulting with an attorney during such proceedings could be a constitutional imperative. Such a constitutionally based right would at odds with how witnesses must act in relation to other testimonial proceedings. There is, of course, no right for a witness to interrupt trial proceedings to consult with an attorney. And some District Courts preclude such consultations even during the course of depositions. (See, e.g. *Hall v. Clifton Precision*, 150 F.R.D. 525, 528-529 (E.D. PA 1993); *Armstrong v. Hussman Corporation*, 163 F.R.D. 299, 302-303 (E.D. MO 1995).)

If we are to agree that witnesses before a grand jury have the right to pop in and out of the proceeding as they

wish (the Court below noted that the respondent's claim against the petitioners was that their actions had "prevented him from freely rendering legal assistance to his client *whenever she chose to seek his advice regarding her grand jury testimony*" (Appendix, A-11, fn.2; all emphasis added)), then why bother keeping the attorneys out of the grand jury room? The only thing accomplished thereby is to slow the entire process as the witness goes in and out of the grand jury room. But he or she is getting to consult with his or her attorney just as much as if the attorney were present in the grand jury room with the witness.

In other words, if there is no right to have an attorney present in the grand jury room, then it must be because there is no right for the witness to disrupt the proceedings by frequent consultations with his or her attorney. (Here, Baker asked to speak with Gabbert after *each* of the three questions posed to her.) Otherwise, the ban serves no logical purpose.

This Court should issue a writ of certiorari and resolve this question. Either allow attorneys into the grand jury room, or require witnesses before the grand jury, like witnesses at trial, to testify without consulting with their attorney before each answer.

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4. ASSUMING THAT INTERFERENCE WITH AN ATTORNEY'S ABILITY TO CONSULT WITH HIS CLIENT DURING GRAND JURY TESTIMONY IS AN ACTIONABLE VIOLATION OF THE ATTORNEY'S RIGHT TO PRACTICE HIS OR HER PROFESSION, IS THE PROPER TEST FOR SUCH INTERFERENCE WHETHER IT PREVENTS THE ATTORNEY FROM PRACTICING ACCORDING TO THE "HIGHEST STANDARDS" OF THE PROFESSION?

The case below did not involve a situation where state officials physically prevented an attorney and his client from consulting. Baker was allowed to leave the grand jury room. She was taken to where Gabbert was being searched. Gabbert was told his client needed to speak with him. Nothing in the record suggests he was prevented from speaking with her by the petitioners or any other state official. Rather, he simply *chose* not to speak to her. (See *ante*, pages 5-6.)

The Court of Appeals avoids having to explain why this conduct did not amount to a waiver of any Fourteenth Amendment claim the respondent might have had by holding that "the right to practice a profession *necessarily* includes the right to practice according to the *highest standards* of that profession" (Appendix, A-13), and finding that the petitioners had to know that Gabbert would be "distracted from giving his full attention and advice to Baker", thus preventing him "from practicing his profession 'according to the highest standards.'" (Appendix, A-16, fn.5)

The only case the Court was able to find to support this conclusion was *Keker v. Procunier*, 398 F.Supp. 756

(E.D. Cal. 1975). But in that case, the District Court's primary focus and concern was the impact the challenged prison conditions had on the ability of inmates to have access to their attorney, rather than on the attorneys' professional rights in isolation. (*Id.* at 761-763.) Here, the primary (if not sole) focus was on the attorney's rights.

To set the test for violations of this "right" as whether there has been interference with the ability of a professional to practice to the "highest standards" of his or her profession is to put an impossible burden on state officials. Virtually *any* act might "distract" a professional, therefore interfering with his or her ability to practice to the highest standards of the profession. What if the bus transporting prisoners to court from the jail is delayed, thus limiting the amount of time the prisoners' attorneys can spend with them prior to hearings or trials? What if a questionable traffic stop prevents, or even just delays, an attorney on his or her way to an important hearing? What if the driver is a doctor, on the way to perform surgery? If the doctor thereafter commits malpractice, can he or she sue for indemnification as well as compensation? What if a decision is made to search a lobbyist before he or she is allowed to enter a public building? Can the lobbyist sue if this upsets him or her, thereby preventing the lobbyist from providing the best lobbying effort to his or her client?

And the situation facing prosecutors is even grimmer. The daily disputes between prosecutors and defense attorneys often become heated and acrimonious. Can prosecutors be sued if the defense attorney then claims that he or she could not provide the best possible defense to his or her client? Here, for example, the entire case turns on the timing of the decision when to call Ms. Baker in before the grand jury. The Court of Appeals concluded that the timing of Ms. Baker's testimony and the search of Mr. Gabbert was a

deliberate effort on the part of the prosecutors to sabotage the ability of the respondent to provide legal assistance to his client. But, as the Court of Appeals noted (although did not seem to take to heart), the actions of public officials are judged on an objective standard, "without regard to their underlying intent or motivation." (Appendix, A-14) Does this mean that if these prosecutors in fact innocently caused the search and the testimony to occur simultaneously, they would *still* be subject to suit, because they should have recognized the possible impact this might have on the attorney's ability to practice to the highest standards of his profession?" After all, the Court of Appeals intimated that *merely distracting* the attorney would be sufficient to establish a cause of action under the right described by the Court in its opinion. (Appendix, A-16, fn.5)

If this Court chooses to allow the scope of the right to practice one's profession to expand to encompass the day-to-day activities of professionals, it cannot allow the "highest standards" test to be the deciding factor. Given that the prior cases in this area have dealt with situations where people were *entirely* deprived of their ability to engage in

* This is why the petitioners are so troubled by the Court of Appeals' almost casual rejection of the idea that the petitioners are entitled to absolute immunity for their actions here. (Appendix, A-9 through A-10) The decision of *when* to call a witness to testify before a grand jury *clearly* is exclusively a prosecutorial function, not an investigative activity. Yet the petitioners are being held to answer civilly for this act of prosecutorial discretion. Without the power given to them *as prosecutors* to determine when Baker testified, it would be impossible for the respondent to even make out a rational claim here. Therefore the petitioners *should* have been granted absolute immunity.

a profession, it would seem more appropriate to set a similar standard here. That is, that the interference must be such as to prevent the professional from practice even up to the *minimal* standards of the profession. In other words, situations where the client is deprived of *any* effective service from the professional, not simply those occasions where the professional performs competently, but not necessarily to the very best of his or her abilities.

This Court should grant this petition to clarify this issue before a host of cases get filed based on violations of the extraordinarily high standard established by the Court of Appeal below.

5. CAN IT HONESTLY BE SAID THAT THIS RIGHT WAS SO CLEARLY ESTABLISHED AS TO PRECLUDE GRANTING THE PETITIONERS QUALIFIED IMMUNITY?

The foregoing discussion makes clear just how unclear and uncertain is the "right" promulgated by the Court of Appeals in this case. To hold that these two petitioners should have known that what they allegedly did violated this "right" is patently unfair. There is simply no way that they, or anybody else (including the District Judge that granted their motion for summary judgment), would have understood that their actions violated *this* "right", a right that only exists because the Court of Appeals tied together several different legal threads to create a new constitutional tapestry. (See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), holding that to preclude the application of qualified immunity, "[t]he contours of the right [allegedly violated] must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right.")

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Die Aufwände an die Finanzkraft Anstaltschancen zeigen, dass

Plaintiff-Appellant.) No. 95-56610

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v.) D.C. No. CV-

DAVID CONN; CAROL NAJERA;) 94-04227-RSWL

LESLIE ZOELLER: ELLIOT)

OPPENHEIM,) OPINION

(XCD)

September 11, 1997 -- Pasadena, California

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OPINION

HAWKINS, Circuit Judge:

The prosecution and defense of criminal allegations produce ample opportunity for adversarial conflict. Without even looking for trouble, the interests of prosecution and defense can collide. This appeal demonstrates what can happen when one side steers those forces into direct and obvious conflict. Here, the prosecution's desire to gather evidence for the re-trial of a high-profile murder case runs directly into a defense attorney's right to consult with his client. The result is not a pretty picture. It is made all the worse because it appears to have been an entirely avoidable collision.

The case comes to us in the form of a civil rights damage action. Attorney Paul L. Gabbert ("Gabbert") wishes to pursue the action against two deputy district attorneys, a police officer, and a court-appointed special master. He alleges violations of his Fourth and Fourteenth

Amendment rights arising out of a search of his person and effects executed just moments before his client entered a grand jury room. The district court dismissed Gabbert's Fourth Amendment claim and granted summary judgment for the defendants on his Fourteenth Amendment claims. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We hold that Gabbert had a clearly established right to pursue his profession without undue and unreasonable governmental interference and that no reasonable prosecutor or police-officer could have believed that the worst of this conduct was lawful. We also hold that a second search of Gabbert, which violated both state law and the face of the warrant, amounted to a warrantless and therefore unreasonable search.

I. FACTS

Gabbert represented Traci Baker ("Baker"), a defense witness in the first murder trial of Lyle and Erik Menendez.¹ After the close of evidence in that trial, Los Angeles County Deputy District Attorneys David Conn ("Conn") and Carol Najera ("Najera") learned that Lyle Menendez had written a letter to Baker in which he allegedly instructed her to testify falsely.

Armed with this information, Conn obtained a subpoena directing Baker to testify before a grand jury and produce any correspondence that she had received from Lyle Menendez. Beverly Hills Police Department Detective Leslie Zoeller ("Zoeller"), an investigating officer in the Menendez case, served that subpoena on Baker at Gabbert's law office.

¹The events at issue in this appeal occurred during jury deliberations of the first Menendez trial, which ultimately resulted in two hung juries.

The next day, Gabbert sought to file a motion to quash that portion of the subpoena requiring Baker to produce correspondence from Menendez. A Los Angeles Superior Court Judge declined to accept Gabbert's motion for filing and also denied his application for an order shortening time for the hearing on the motion to quash.

At about this same time, Conn, Najera, and Zoeller obtained a warrant to search Baker's apartment for any Menendez correspondence. When presented with the warrant, Baker informed Detective Zoeller that she had given any correspondence from Lyle Menendez to Gabbert. Zoeller relayed this information to Conn and Najera.

Three days later, Gabbert accompanied Baker to her scheduled grand jury appearance. As Gabbert and Baker walked into the building where the appearance was to take place, Conn approached Gabbert and asked him if he had brought the "documents" with him. Conn was referring to the Menendez correspondence, but Gabbert thought Conn was referring to Gabbert's motion to quash and accompanying documents.

Based on Gabbert's response, Conn decided to obtain a warrant to search Gabbert and directed Detective Zoeller to secure it. Under California law, the search of an attorney or law office must be conducted by a court-appointed special master. In this instance, Elliot Oppenheim ("Oppenheim"), a retired lawyer, was authorized to search Gabbert and his effects.

As Baker and Gabbert were waiting outside the grand jury room, Zoeller, at Conn's direction, served Gabbert with the search warrant. At Gabbert's request, the search took place in a private room adjacent to the grand jury room. Before he was actually searched, Gabbert gave Oppenheim two photocopied pages of a three-page letter from Lyle Menendez to Baker, informing Oppenheim that this was the

only document on his person or in his effects that constituted correspondence between Menendez and Baker. Oppenheim proceeded to search Gabbert's files, including at least two files that clearly involved clients other than and unrelated to Baker. When Gabbert protested, Oppenheim proceeded to review the files anyway. Oppenheim also examined the contents of Gabbert's briefcase, including his calendar, wallet, dictaphone, eyeglass case, and notepad.

Within minutes of the search warrant was being executed on Gabbert, Najera, also acting at Conn's direction, called Baker before the grand jury and began to question her. In response to the first question, Baker asked to leave the grand jury room to consult with her attorney. Gabbert, of course, was being searched at this very moment.

Conn's secretary located Gabbert in the room where he was being searched and informed him that his client needed to speak with him. Gabbert, apparently unaware that his client was immediately outside the room, declined to leave. Instead he informed the secretary that the prosecution, which at least in his mind had created the problem, would have to simply delay questioning Baker further while the search was being carried out.

Baker then returned to the grand jury room and, reading off a card she had prepared in advance, asserted her Fifth Amendment privilege against self-incrimination on "the advice of counsel." In response to a second question from Najera, Baker again asked to speak with her attorney and left the room. Gabbert was nowhere to be seen. Baker waited in the hallway until a bailiff appeared, telling her to return to the grand jury room where she once again asserted her Fifth Amendment privilege.

Conn thereupon moved to hold Baker in contempt for failing to produce the documents subject to the subpoena, and the grand jury took a break. Conn, Najera, and Zoeller,

with Baker in tow, then joined Oppenheim and Gabbert in the room where Oppenheim had just searched Gabbert. Oppenheim informed Conn that Gabbert did not possess the materials subject to the search warrant, but that Gabbert's effects did not contain privileged matters. Gabbert disputed this statement and informed Conn that he had files of other clients as well as privileged matters concerning Baker (e.g., Gabbert's notes of his interview with Baker). Conn thereupon informed Gabbert that Detective Zoeller would conduct a follow-up search of Gabbert's person and effects. Gabbert neither consented to nor resisted this search which was carried out by Zoeller with Conn and Najera looking on. Oppenheim took no part in this second search.

II. PROCEDURAL HISTORY

Gabbert contends his Fourth Amendment right to be free from unreasonable searches and seizures and his Fourteenth Amendment right to practice his profession without unreasonable governmental interference were both violated. The district court dismissed his Fourth Amendment claims, finding that Zoeller and Oppenheim had absolute immunity and Conn and Najera had qualified immunity. The district court found that Zoeller, as a public officer executing a court order, had quasi-judicial immunity and that Oppenheim was immune from suit as a judicial officer performing a judicial function. The district court declined to give the deputy district attorneys absolute immunity because it found they were acting as investigators, not advocates, during the search and grand jury proceeding. Finally, the district court denied the defendants' motion to dismiss Gabbert's Fourteenth Amendment claims.

The district court denied Gabbert's motion for leave to amend his complaint to include a state law claim under

California Penal Code § 1524(c), the statute regulating the search of lawyers or law offices. The district court declined to exercise supplemental jurisdiction over a civil claim based on a violation of Cal.Penal Code § 1524, finding that it presented a novel question of state law which would substantially predominate over Gabbert's remaining Fourteenth Amendment claims.

The defendants moved for summary judgment on Gabbert's Fourteenth Amendment claims. The district court granted summary judgment for Conn and Najera based on qualified immunity and for Zoeller and Oppenheim based on absolute immunity.

III. STANDARD OF REVIEW

Both a dismissal for failure to state a claim and a grant of summary judgment on the basis of qualified immunity in a 42 U.S.C. § 1983 action are reviewed de novo. *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1043 (9th Cir.1996) (summary judgment); *Stone v. Travelers Corp.*, 58 F.3d 434, 436-37 (9th Cir.1995) (Fed. R. Civ. Proc.12(b)(6)); *Neely v. Feinstein*, 50 F.3d 1502, 1507 (9th Cir.1995) (qualified immunity in § 1983 action). These same authorities teach that we must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. This court reviews a denial of leave to amend a complaint for an abuse of discretion. *Maljack Prods. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 888 (9th Cir.1996).

IV. ANALYSIS

"To sustain an action under section 1983, a plaintiff must show (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of a federal constitutional or statutory right." *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir.1989).

Absolute immunity, a total defense at the outset to a civil rights action, is afforded to those officials performing special functions that require independence and fearless performance. *See Burns v. Reed*, 500 U.S. 478, 484-85 (1991). An official seeking absolute immunity from a § 1983 action bears the burden of showing that such immunity is applied for the function at issue. *See id.* at 486. There is a presumption that qualified rather than absolute immunity is generally sufficient to protect government officials. *See id.* Absolute immunity is given sparingly. *See id.*

The qualified immunity doctrine protects government officials from civil liability under § 1983 "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Analysis of a qualified immunity claim involves three steps: (1) identifying the specific right allegedly violated; (2) determining whether the right was so "clearly established" as to alert a reasonable officer to its constitutional parameters; and (3) determining whether a reasonable public officer could have believed that the particular conduct at issue was lawful. *See Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir.1996); *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1363-64 (9th Cir.1994).

When the underlying facts are undisputed, the district court must decide whether a public officer is entitled to

qualified immunity "at the earliest possible point in the litigation." *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir.1993) (interpreting *Hunter v. Bryant*, 502 U.S. 224, 227-28 (1991)).

A. FOURTEENTH AMENDMENT CLAIM

1. Immunity of the Prosecutors

a. Absolute Immunity

Conn and Najera claim that absolute immunity protects them from liability for Gabbert's § 1983 claims. Prosecutors are entitled to absolute immunity from suit under § 1983 for conduct "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976). The law affords absolute immunity to a prosecutor for performing the functions of a prosecutor, rather than simply for having the status of prosecutor. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

Prosecutors are entitled to absolute immunity for initiating and pursuing prosecution. *See Imbler*, 424 U.S. at 431. This immunity extends to prosecutorial conduct before grand juries. *See Burns*, 500 U.S. at 490 n. 6. Prosecutors are not protected by absolute immunity, however, when they act as investigators rather than as advocates. *See Buckley*, 509 U.S. at 273. A prosecutor performing functions generally performed by detectives or police officers loses entitlement to absolute immunity but is eligible for the qualified immunity usually accorded those actions. *See id.*

Gabbert claims Conn and Najera violated his constitutional rights by their timing of the service of the search warrant and directing the second search. The district court found that Conn and Najera acted as investigators, not

advocates, by participating or directing the pre-indictment gathering of evidence. The district court's determination in this regard is on solid ground, as the prosecutors here performed activities more associated with police functions: they served a search warrant upon Gabbert's client at her residence, directed a police officer to obtain a search warrant for Gabbert, were present when the police officer served the warrant to Gabbert, introduced Gabbert to the special master, informed Gabbert of the need for a second search, were present for the second search, and viewed Gabbert's documents during the search. Thus, the district court properly found that prosecutors Conn and Najera were not entitled to absolute immunity for their actions.

b. Qualified Immunity

Alternatively, Conn and Najera claim they are entitled to qualified immunity. The threshold question in resolving such a claim is whether the plaintiff has identified a specific right allegedly violated by government actors. *See Newell*, 79 F.3d at 117. "Due process violations must be particularized before they can be subjected to the clearly established test." *Id.* (quoting *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir.1995)); *Alexander v. County of Los Angeles*, 64 F.3d 1315, 1319 (9th Cir.1995). Gabbert's claim is specific: the Fourteenth Amendment protects his right to practice his profession without undue and unreasonable governmental interference.

The Fourteenth Amendment protects "the right of the individual ... to engage in any of the common occupations of life." *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972); *see Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 65 n. 4 (9th Cir.1994) ("[P]ursuit of an occupation or profession is a protected liberty interest."). Such a right

is both a liberty and property right protected from state deprivation or undue interference. *See Kecker v. Procunier*, 398 F.Supp. 756, 760 (E.D.Cal.1975) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); *see Greene v. McElroy*, 360 U.S. 474, 492 (1959) (right to hold specific private employment and to follow chosen profession free from unreasonable governmental interference protected by Fifth Amendment); *see also In re Griffiths*, 413 U.S. 717, 722-27 (1973) (state requirement of United States citizenship violates attorney's right to practice law). Because the Fourteenth Amendment protects an individual's right to practice a profession free from undue and unreasonable state interference, Gabbert has identified a specific right allegedly violated.²

Having identified the specific right at issue, we turn to whether that right was clearly established at the time the prosecutors allegedly interfered with that right. *See Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "If the controlling law is not clearly established, a reasonable person would not be expected to

²The prosecutors seek to characterize Gabbert's claim as one for lost professional opportunities or injury to his professional reputation. Injury to a professional reputation is not a liberty interest protected by the Fourteenth Amendment. *See Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *Paul v. Davis*, 424 U.S. 693 (1976). Gabbert's claim is that the prosecutors' conduct directly interfered with his ability to practice his profession. Specifically, he contends that the prosecutors' conduct prevented him from freely rendering legal assistance to his client whenever she chose to seek his advice regarding her grand jury testimony. Thus, those cases failing to find a liberty interest in a loss of reputation are inapposite.

know how to structure his conduct in order to avoid liability." *Romero v. Kitsap County*, 931 F.2d 624, 628 (9th Cir.1991) (quoting *Todd v. United States*, 849 F.2d 365, 368-69 (9th Cir.1988)). The plaintiff bears the burden of showing that the right allegedly violated was clearly established. *See Collins v. Jordan*, 110 F.3d 1363, 1369 (9th Cir.1996).

A right is clearly established "[i]f the only reasonable conclusion from binding authority [was] that the disputed right existed." *Blueford v. Prunty*, 108 F.3d 251, 255 (9th Cir.1997). "The contours of the right must be sufficiently clear that [at the time the allegedly unlawful action is taken] a reasonable official would understand that what he is doing violates that right." *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir.1994) (quoting *Anderson*, 483 U.S. at 640). For a right to be clearly established, "the very action in question" need not "ha[ve] previously been held unlawful"; instead, the "unlawfulness must be apparent" in light of pre-existing law. *Anderson*, 483 U.S. at 640. "Thus, when the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *Mendoza*, 27 F.3d at 1361 (quoting *Casteel v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir.1993)); *see Backlund v. Barnhart*, 778 F.2d 1386, 1390 (9th Cir.1985) ("Certainly ... [§ 1983 plaintiffs] need not always produce binding precedent.... There may be cases of conduct so egregious that any reasonable person would have recognized a constitutional violation.").

The unusual facts of this case preclude "the very action in question" to be clearly established in our case law. Nevertheless, long-standing precedent establishes the

importance of the attorney-client relationship during a client's grand jury testimony. A witness has an absolute duty to answer all questions before a grand jury. *See United States v. Mandujano*, 425 U.S. 564, 581 (1976). This absolute duty is subject to limitation: the witness is "free at every stage to interpose his constitutional privilege against self-incrimination." *See id.* at 584. To assist the witness in asserting this privilege, a witness has the right to consult with her attorney outside the grand jury room. *Id.* at 581. This right to assistance is clearly established in this and other circuits. *United States v. Plache*, 913 F.2d 1375, 1380 (9th Cir.1990) (witness has "a right to consult with an attorney waiting outside the grand jury room during the proceedings"); *United States v. Schwimmer*, 882 F.2d 22, 27 (2d Cir.1989) (same); *In re Grand Jury Proceedings*, 859 F.2d 1021, 1024 (1st Cir.1988) (same). The witness's clearly established right to assistance, however, cannot be exercised if government officials unnecessarily interfere with an attorney's ability to provide that advice.

A constitutional right may be clearly established "both by common sense and by precedent." *Newell*, 79 F.3d at 117. Both clearly establish that the right to practice a profession necessarily includes the right to practice according to the highest standards of that profession. There is no right more central to that notion than the right to maintain the privacy and freedom from intrusion essential to the attorney-client relationship. *See Damron v. Herzog*, 67 F.3d 211, 214 (9th Cir.1995); *DeMassa v. Nunez*, 770 F.2d 1505, 1506-07 (9th Cir.1985); *see also* Model Rules of Professional Conduct Rule 1.6. Common sense necessarily leads to the conclusion that an attorney has the right to practice his profession in privacy and freedom from unreasonable intrusion by "waiting outside the grand jury room" during his client's testimony. *Plache*, 913 F.2d at

1380. Therefore, we hold that Gabbert had the clearly established right to practice law free from undue and unreasonable governmental interference.

The final step in a qualified immunity analysis is whether a reasonable official could have believed the conduct at issue was lawful under that clearly established law. *See Mendoza*, 27 F.3d at 1362. A defendant must show that a reasonable officer could have believed that the conduct was lawful. *See Collins*, 110 F.3d at 1369. We decide whether the officials' actions were objectively reasonable under the facts and circumstances, without regard to their underlying intent or motivation. *See Graham v. Connor*, 490 U.S. 386, 397 (1989).

Here, two streams of events collided. The prosecutors were poised with a search warrant for Gabbert's effects to be carried out by a special master pursuant to California procedure. Baker, as required by her grand jury subpoena, was present and prepared to appear before the grand jury. The prosecutors were in control of both events: they controlled the timing of the execution of the search warrant on Gabbert and his client's grand jury appearance. The only apparent reason to have both occur at the same time was the prosecutors' desire to prevent Gabbert from communicating with his client.

There was a clear and obvious path that, if followed, would have allowed the prosecutors to both execute the search warrant as well as permit Baker to appear before the grand jury with Gabbert available for consultation. The prosecutors could have simply delayed Baker's grand jury appearance while the special master searched Gabbert and his files. Baker would have had no right to be present when Gabbert was searched and therefore could have been kept comfortably out of harm's way. Alternatively, the prosecutors could have delayed the search of Gabbert until

his client was finished testifying before the grand jury.

The prosecutors chose instead to pursue a path that put these two events into direct conflict, executing the search warrant on Gabbert at almost the exact time Baker was being haled into the grand jury room.³ The plain and intended

³We have had occasion to describe the "model of government sensitivity to the special privacy interests that are implicated when a law firm's files must be searched" pursuant to a warrant. *See In re Grand Jury Subpoenas Dated December 10, 1987*, 926 F.2d 847, 858 (9th Cir.1991).

From the time the warrants were requested, the officers took considerable care in minimizing the intrusion into the privacy of the Doe Four law firm. *The Government intentionally timed the search for a time of day when it would least disrupt the law firm's activities.* The Government also suggested to the issuing court that it impose any special restrictions on the execution of the warrants it deemed appropriate in light of the facts that the files in a law office would be searched.

The execution of the warrants, likewise, shows considerable concern for the privacy interests of the law firm and its clients. *At the main office, the agents delayed the search while law firm attorneys negotiated with the United States Attorney as to the best way to meet the Government's need for these documents.* An agreement was reached that the officers would not conduct a search of the files. Instead, law firm personnel searched

result was to prevent Gabbert from consulting with Baker during her grand jury appearance.⁴ These actions were not objectively reasonable, and thus the prosecutors are not protected by qualified immunity from answering Gabbert's Fourteenth Amendment claim.⁵

the files and identified the relevant documents. These documents were sealed and turned over to the district court.

At the satellite office, the officers seized the files bearing the names of the persons identified in the warrant, without reviewing the contents. These documents were sealed and delivered to the district court.

As the result of these precautions, the privacy interests of the persons subject to the search were fully protected.

Id. (emphasis added). Although we do not prescribe a specific method for executing a search warrant on a lawyer or law office, we note that prosecutors Conn and Najera miserably failed to achieve the cooperative attitude exhibited in this model.

⁴The prosecutors' counsel conceded at oral argument that the only reason for the timing of the search was "to take advantage" of this situation.

⁵We are unpersuaded by the prosecutors' argument that their actions were objectively reasonable because they had no reason to know that Baker did not, in fact, consult with Gabbert when she left the grand jury room. It is true that, upon Baker's return to the grand jury room, she invoked her privilege against self-incrimination on "the advice of

Our holding does not provide a basis for a private attorney to resist legitimate criminal procedure and litigation devices--such as search warrants or discovery requests--in cases against the government. Nor does our holding transform every violation of a client's constitutional rights into a corresponding violation of an attorney's constitutional rights. Rather, our holding is narrow: a state government violates an attorney's Fourteenth Amendment rights when its officers unduly and unreasonably interfere with the attorney's right to practice his profession by preventing the attorney from offering legal assistance to the client in the very matter and at the very moment for which the lawyer was retained.

2. Immunity of the Detective

Detective Zoeller claims absolute immunity from Gabbert's § 1983 claim for violating his Fourteenth Amendment rights. Zoeller relies on *Coverdell v. Department of Social and Health Servs.*, 834 F.2d 758 (9th Cir.1987), for the proposition that a police officer has absolute quasi-judicial immunity from liability when executing a search warrant. We do not reach this issue because we find that Zoeller is protected by qualified immunity. See *Marks v. Clarke*, 102 F.3d 1012, 1024-25 (9th Cir.1997); *Ortiz v. Van Auken*, 887 F.2d 1366, 1370 (9th Cir.1989).

counsel." Baker's prepared statement, however, does not make the prosecutors' actions objectively reasonable. At best, the prosecutors had to know that Gabbert was distracted from giving his full attention and advice to Baker. This distraction prevented Gabbert from practicing his profession "according to the highest standards." *Keker*, 398 F.Supp. at 761.

As discussed above, Gabbert had a clearly established right to practice his profession free from undue and unreasonable governmental interference. Thus, our focus turns to whether a reasonable police officer could have believed this conduct was lawful.

We find Detective Zoeller's conduct objectively reasonable. The warrant at issue expressly stated that it could "be served at any time of the day or night." Zoeller served the warrant on Gabbert at the direction of Conn. Most importantly, Zoeller had no control over the timing of the prosecutors' calling Baker to the grand jury room. Therefore, Zoeller is entitled to qualified immunity from Gabbert's Fourteenth Amendment claim.

3. Immunity of the Special Master

Special Master Oppenheim also claims absolute quasi-judicial immunity. Judicial immunity may be extended to officials other than judges when "their judgments are functionally comparable to those of judges--that is, because they, too, exercise a discretionary judgment as part of their function." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993). We have extended absolute quasi-judicial immunity to special masters. *See Atkinson-Baker & Assocs., Inc. v. Kolts*, 7 F.3d 1452, 1454-55 (9th Cir.1993) (noting that a special master "clearly exercise[s] discretionary judgment as part of his function").

Oppenheim exercised discretionary judgment as part of his function. California Penal Code § 1524(c)(1) expressly calls upon the "judgment of the special master." Moreover, § 1524 requires the special master to assess the relevance of any items he examines and to determine whether the party served complied with the warrant. These "discretionary judgments" are functionally comparable to

those a judge would make in the absence of a special master. *Antoine*, 508 U.S. at 436. Oppenheim therefore is entitled to absolute quasi-judicial immunity.⁶

B. FOURTH AMENDMENT CLAIM

1. Immunity of the Prosecutors

Gabbert claims that deputy district attorneys Conn and Najera violated his Fourth Amendment right to be free from unreasonable searches when they engaged in an impermissible second search of his person and possessions without a valid warrant and failed to comply with California Penal Code § 1524.

For the reasons stated above, we reject the prosecutors' claim to absolute immunity. We must determine whether the prosecutors are entitled to qualified immunity.

Searches of attorneys and their offices, of course, are ripe with potential for controversy. Conducted without restraint, legitimate privileges and privacy expectations, including those of uninvolved third parties, can be violated. For this and other sensible policy reasons, California law wisely requires that such searches be carried out by special masters and that disputes over what may or may not be seized be taken promptly before a trial judge for resolution.

⁶Although the law affords absolute immunity to Special Master Oppenheim, it should be noted that he violated several provisions of the California statute regulating the execution of a search of an attorney. *See* Cal. Penal Code § 1524. Additionally, his decision that Gabbert's files contained no privileged material because the documents were not stamped or marked "privileged" is contrary to even the most basic understanding of the attorney-client privilege.

Cal.Penal Code § 1524; see *People v. Superior Court*, 37 Cal.App.4th 1757, 44 Cal.Rptr.2d 734 (1995); *Geilim v. Superior Court*, 234 Cal.App.3d 166, 285 Cal.Rptr. 602 (1991).

We cannot accept, however, Gabbert's claim that the prosecutors' alleged violation of Cal.Penal Code § 1524 is actionable under 42 U.S.C. § 1983. State law cannot form the basis of a § 1983 claim unless the violation of that law also results in a constitutional or federal law violation. See *Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3, 6 (1st Cir.1997); *Long v. Norris*, 929 F.2d 1111, 1114 (6th Cir.1991); *Barry v. Fowler*, 902 F.2d 770, 772 (9th Cir.1990). Therefore, the district court properly rejected Gabbert's § 1983 claim based on a violation of state law.

Gabbert also alleges, however, that the prosecutors violated his Fourth Amendment rights by searching or participating in a search of his personal effects without a valid or lawful warrant.

We agree with the district court that the search warrant authorizing Special Master Oppenheim to search Gabbert was valid. See *United States v. Cannon*, 29 F.3d 472, 478 (9th Cir.1994) (warrant is valid if issuing judge had substantial basis to conclude affidavit establishes probable cause); *Forster v. County of Santa Barbara*, 896 F.2d 1146, 1148 (9th Cir.1990) (§ 1983 defendant entitled to qualified immunity even if the affidavit contained intentionally or recklessly false statements if the affidavit contained sufficient content to support probable cause). We disagree with the district court that the valid search warrant authorized the prosecutors to direct the second search of Gabbert.

Although a state law violation is not actionable in a § 1983 claim, federal courts must necessarily consider the lawfulness of a search under state law. See *Pierce v. Multnomah County, Or.*, 76 F.3d 1032, 1038 (9th Cir.)

(state law determines reasonableness of arrest in § 1983 claim), *cert. denied*, 117 S.Ct. 506 (1996); *United States v. Mota*, 982 F.2d 1384, 1387 (9th Cir.1993) (reasonableness of arrest determined by referring to state law in a criminal case); *United States v. Wanless*, 882 F.2d 1459, 1464 (9th Cir.1989) (federal law may require searches and seizures be conducted in accordance with state law). Also, "a violation of state ... law can serve as the basis of a section 1983 action '[w]here the violation of state law causes the deprivation of rights protected by the Constitution.' " *Draper v. Coombs*, 792 F.2d 915, 921 (9th Cir.1986) (quoting *Wirth v. Surles*, 562 F.2d 319, 322 (4th Cir.1977)). Therefore, we will look to Cal.Penal Code § 1524 and the face of the warrant to determine whether the search warrant authorized the second search of Gabbert.

The California law governing the search of attorneys for documentary evidence permits only the special master to conduct the search. Cal.Penal Code § 1524(e). The statute forbids the party seeking or serving the warrant from participating in the search except upon the agreement of the party being searched. See *id.* The prosecutors knew of the statute's requirements and thus directed Detective Zoeller to obtain a search warrant pursuant to that statute. The search warrant stated that Detective Zoeller would search Gabbert "through Special Master Elliot Oppenheim." Neither California law nor the face of the search warrant authorized the prosecutors to participate in the second search of Gabbert without his consent. Thus, the second search was warrantless.

The prosecutors argue that the second search was not warrantless because it was a continuation of the first search under a valid warrant. It is true that courts have allowed second searches under the same warrant, as long as the subsequent search could be considered a continuation of the

first search. See *United States v. Kaplan*, 895 F.2d 618, 623 (9th Cir.1990); *United States v. Carter*, 854 F.2d 1102, 1107 (8th Cir.1988). In both those cases, however, the same officer conducted the first search and returned shortly to retrieve items listed in the search warrant. See *Kaplan*, 895 F.2d at 623; *Carter*, 854 F.2d at 1105. California law makes clear that only the special master may execute a search of this type. Here, Detective Zoeller conducted the second search at the direction of the prosecutors. Nor did Gabbert consent to the second search by someone other than the special master. A search conducted in such flagrant disregard of statutory norms and the plain requirements of the warrant itself cannot be a continuation of the first search and thus becomes an impermissible general search. See *United States v. Mittelman*, 999 F.2d 440, 442-43 (9th Cir.1993).

Qualified immunity from civil liability can extend to officials who perform unlawful warrantless searches. See *Barlow v. Ground*, 943 F.2d 1132, 1139 (9th Cir.1991). The right to be free from warrantless searches absent an applicable exception to the warrant requirement is clearly established. See *California v. Acevedo*, 500 U.S. 565, 569 (1991); *United States v. Rambo*, 74 F.3d 948, 953 (9th Cir.), cert. denied, 117 S.Ct. 72 (1996). Thus, "[t]he relevant inquiry is whether a reasonable government official could have believed his conduct was lawful, in light of clearly established law and the information he possessed." *Thorsted v. Kelly*, 858 F.2d 571, 573 (9th Cir.1988).

Conn was clearly aware that California law permitted only a special master to search Gabbert. He directed Detective Zoeller to add to the existing affidavit and to secure a search warrant for Gabbert's person and effects. Both the affidavit and the search warrant stated that the search would be conducted by Special Master Oppenheim

pursuant to § 1524. In viewing the evidence in the light most favorable to the non-moving party, see *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.1996), the record shows that Conn directed Zoeller to search Gabbert after the initial search by the special master. Conn stood close by as Detective Zoeller conducted this warrantless second search. Conn's conduct was therefore not objectively reasonable, and he is not entitled to qualified immunity from Gabbert's Fourth Amendment claim.

Although a reasonable prosecutor in Najera's position might also know that the second search was unlawful, the evidence does not show that she was sufficiently involved in the second search to be liable under § 1983. She neither directed the detective to obtain the search warrant nor instructed him to conduct the warrantless second search. Her mere presence during the second search does not arise to a violation of either federal or state law. We therefore affirm the district court's dismissal of Gabbert's Fourth Amendment claim against Najera.

2. Immunity of the Detective

Gabbert asserts similar Fourth Amendment violations against Detective Zoeller. A police officer does not enjoy absolute immunity from suit for conducting a search but may be protected by qualified immunity. See *Liston v. County of Riverside*, 120 F.3d 965, 975 (9th Cir.1997). We conclude, for the reasons stated above, that the second search of Gabbert conducted by Detective Zoeller was not authorized by the existing warrant and that Gabbert had a clearly established right to be free from warrantless searches.

The evidence compels the conclusion that a reasonable officer in Zoeller's situation could not have believed that his conduct was lawful. In his affidavit, Zoeller requested the

appointment of a special master pursuant to § 1524 "to assist in the search of Mr. Gabbert's documents." He stated that this fulfilled the requirements of the statute. The search warrant issued by the magistrate authorized the special master, not Zoeller, to conduct the search. Clearly, Zoeller knew of the existence of § 1524 and its special master requirement. A reasonable officer would know, not only the existence of the law, but also its general requirements. Detective Zoeller cannot escape liability from Gabbert's claim by asserting ignorance of the substance of the governing law. Therefore, a reasonable detective would know, from the applicable law and from the face of the search warrant, that he was not authorized to search Gabbert. We conclude that Zoeller does not have qualified immunity from Gabbert's Fourth Amendment claim.

3. Immunity of the Special Master

Gabbert claims that Special Master Oppenheim violated his Fourth Amendment rights by conducting an overbroad search. Oppenheim enjoys absolute immunity for all activities performed pursuant to his role as special master. *See Atkinson-Baker & Assocs.*, 7 F.3d at 1454-55. Although we are mystified by Oppenheim's apparent disregard for the plain requirements of Cal.Penal Code § 1524, he was in fact acting pursuant to a warrant and at least generally doing those things authorized by it. Moreover, the things he searched were those that might have legitimately contained the correspondence specified in the warrant. *See United States v. Grandstaff*, 813 F.2d 1353, 1358 (9th Cir.1987). We therefore affirm the district court's dismissal of this claim against Oppenheim.

C. SUPPLEMENTAL JURISDICTION OF THE DISTRICT COURT

Because the district court's denial of Gabbert's motion for leave to amend his complaint to include a cause of action under Cal.Penal Code § 1524 was based, in part, on its dismissal of Gabbert's Fourth Amendment claims, we assume, without deciding the issue, that the district court will want to revisit this ruling.

V. CONCLUSION

In the procedural posture this case comes to us, we are necessarily limited. Only the fullness of discovery and perhaps a trial on the merits can fully explore Gabbert's claims and the defendants' defenses. Defendants may be able to establish that, whatever they did, it did not materially affect Gabbert's rights. We can only say that Gabbert's claims merit full exposition and defendants' defenses complete exploration.

The order granting summary judgment to prosecutors Conn and Najera on Gabbert's Fourteenth Amendment claims is REVERSED. The order granting summary judgment to Detective Zoeller and Special Master Oppenheim on Gabbert's Fourteenth Amendment claims is AFFIRMED. The dismissal of Gabbert's Fourth Amendment claims against Conn and Zoeller is REVERSED. The dismissal of Gabbert's Fourth Amendment claims against Najera and Oppenheim is AFFIRMED.

The case is remanded to the district court for further proceedings in accordance with this opinion. Each party to bear its own costs. The panel retains jurisdiction over further appeals of this matter.

FILED
SEP 30 1994
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

THIS CONSTITUTES NOTICE OF ENTRY AS
REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Paul L. Gabbert,	)	CASE NO. CV 94-
	)	4227-RSWL (Ex)
Plaintiff,)	
)	
vs.	)	ORDER
)	
David Conn, Carol Najera,)	
Elliot Oppenheim, Leslie)	
Zoeller and Does 1 through X)	
)	
Defendants.)	
)	

Two of the defendants in the above-captioned action, David Conn and Carol Najera, have moved to dismiss Plaintiff Paul L. Gabbert's 42 U.S.C. § 1983 suit. Defendants Conn and Najera base their Fed. R. Civ. P. 12(b)(6) motion to dismiss on, alternatively: absolute immunity; qualified immunity; and lack of causation. The matter was set for oral argument on September 19, 1994, but

was removed from the Court's law and motions calendar pursuant to Fed. R. Civ. P. 78, for disposition based on the papers filed.

Now, having carefully considered all of the papers filed in support of and in opposition to the motion, the Court hereby **GRANTS** in part and **DENIES** in part Defendants' Motion to Dismiss.

I. BACKGROUND

Plaintiff Gabbert is counsel for Tracy Baker, a witness in the recent Menendez brothers murder trial. In March of 1994, Baker was being investigated by the Los Angeles District Attorney's office for perjury during the Menendez trial. Baker was called to testify before a grand jury on this issue.

At the Beverly Hills courthouse on March 21, 1994, as Plaintiff escorted his client to the grand jury hearing, Plaintiff was served with a search warrant by Detective Leslie Zoeller.¹ While Baker testified before the grand jury, Plaintiff's person, briefcase, and accordion file were searched by Special Master Elliott Oppenheim.² Immediately after Oppenheim's search of Plaintiff, Plaintiff was searched again by Detective Zoeller. District attorneys David Conn and

¹ Leslie Zoeller is another defendant in this action but is not a party to this motion to dismiss.

² Oppenheim conducted the first search as a "special master" pursuant to Cal. Penal Code § 1524(c)(1) which requires the appointment of a special master when a search warrant is issued for documentary evidence in the possession of a lawyer. Oppenheim is another defendant in this action, but is not a party to this motion to dismiss.

Carol Najera, the moving parties in this motion, were present during this second search of Plaintiff.

Plaintiff alleges that the search warrant was obtained illegally, that the material searched was protected by the attorney-client privilege, and that the search went beyond the scope of the warrant. Plaintiff has filed suit under 42 U.S.C. § 1983,³ claiming constitutional violations including the sixth amendment right to counsel, fourth amendment, and substantive due process violations.

II. DISCUSSION

A. Standard for Dismissal Under Fed. R. Civ. P. 12(b)(6).

In a Rule 12(b)(6) motion to dismiss, the Court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the non-moving party. Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987); United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981). A court need not, however, accept conclusory allegations or unreasonable inferences at

³ 42 U.S.C. § 1983 provides that

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

face value. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir.), cert. denied 454 U.S. 1031, 102 S.Ct. 567 (1981). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (9th Cir. 1986).

In deciding on a Rule 12(b)(6) motion to dismiss, the court generally may not consider material beyond the pleadings. Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). However, material which is properly submitted as part of the complaint may be considered, and documents those whose contents are alleged in a complaint, and whose authenticity is not questioned may also be considered, even if the material is not physically attached to the complaint. Id. at 454.

B. Defendants Conn and Najer's First Ground for Dismissal: Absolute Immunity as Prosecutors.

Defendants first move that Plaintiff's § 1983 suit be dismissed against them on the grounds that, as prosecutors, they have absolute immunity from suit under § 1983.

The government official seeking absolute immunity bears the burden of showing that such immunity is justified for the action at issue. Burns v. Reed, -- U.S. --, 111 S.Ct. 1934, 1939 (1991). There is a presumption that qualified rather than absolute immunity is generally sufficient to protect government officials. Id. Absolute immunity is given sparingly. Id.

Prosecutors are entitled to absolute immunity from suit under § 1983 for conduct "intimately associated with the judicial phase of the criminal process." Imbler v. Pachtman, 424 U.S. 411, 431, 96 S.Ct. 984, 995 (1976). In

determining a prosecutor's immunity, the court looks at the function performed by the prosecutor, rather than the prosecutor's status as prosecutor.

Prosecutorial activities in initiating and pursuing prosecution are "functions to which the reasons for absolute immunity apply with full force," and prosecutors are entitled to absolute immunity when performing those functions. *Id.* However, prosecutors are not protected by absolute immunity when they act as police investigators rather than as advocates preparing for trial. Buckley v. Fitzsimmons, -- U.S. --, 113 S.Ct. 2606, 2616 (1993). In other words, when a prosecutor performs functions generally performed by detectives or police officers, he receives the immunity usually accorded those actions -- i.e., qualified, not absolute immunity.

In order for Defendants to prevail on their claim for absolute immunity, they must show that they were functioning as advocates rather than as investigators. The Buckley Court found that a prosecutor cannot be acting as an advocate unless, as a threshold question, he has probable cause to initiate judicial proceedings. Even after a determination of probable cause, the prosecutor who engages in police investigative work receives only qualified immunity. 113 S.Ct. at 2616 & n.5. The question is not whether the conduct is related to the decision of whether to prosecute, but "whether the prosecutor's actions are closely associated with the judicial process." Burns, 111 S.Ct. at 1944.

Plaintiff argues that Defendants acted as police investigators, rather than advocates, because the "single purpose of the defendants' conduct was to gather evidence." *Opp.* at 12. Defendants' purpose, however, is not the issue here, in that it is possible for prosecutors to be granted absolute immunity for investigative functions which are connected to their role as advocates. Imbler, 424 U.S. at

432, 96 S.Ct. at 995 n.33 (noting that the prosecutor's role as advocate involves conduct preliminary to the initiation of prosecution, including other actions outside the courtroom).

Rather, the issue is Defendants' function during those investigations. Preparation for actions undertaken as an advocate may require investigative and administrative conduct which is shielded as connected to the prosecutor's role as advocate. *Id.* As the Supreme Court has stated, "Drawing a proper line between these functions may present difficult questions." *Id.* Similarly, Plaintiff's assertion that Defendants were engaging in "quintessentially investigative conduct" begs the question of what role Defendants acted in while they were engaging in that conduct.

Plaintiff alleges that Defendants' Conn and Najera delayed Plaintiff at the courthouse under the pretext of supplying Plaintiff with a letter granting his client immunity, until Plaintiff was served with the search warrant. Plaintiff further alleges that Conn and Najera were present when Plaintiff was served with the search warrant, and that Conn introduced Plaintiff to Special Master Oppenheim, who conducted the first search. Lastly, Plaintiff alleges that Conn and Najera were present for the second search and viewed Plaintiff's documents during the search, after Conn informed Plaintiff that Special Master Oppenheim had determined nothing in the briefcase and files was privileged.

Taking all of the above allegations as true, and making all inferences in favor of the non-moving party as is required on a 12(b)(6) motion, the Court finds that the conduct of Defendants Conn and Najera constitutes participation in the investigations. Further, the Court finds that these investigations were not connected to Defendants' role as advocates, but, rather, were pre-indictment evidence-gathering more associated with police functions. For those

reasons, the Court **DENIES** Defendants Conn and Najera's claim to absolute immunity.

C. Defendants' Second Claim: Qualified Immunity as Government Officials.

Alternatively, Defendants Conn and Najera move for dismissal of Plaintiff's § 1983 action on the basis of their qualified immunity as government officials. Qualified immunity shields government officials from suit for damages when they perform discretionary functions, and their conduct does not violate clearly established statutory or constitutional rights of which a reasonable official would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). The Ninth Circuit has set out a three prong inquiry for determining qualified immunity: identification of the specific right allegedly violated; determining whether it was so "clearly established" as to alert reasonable officers; and determining the ultimate issue of whether a reasonable officer could have believed the particular conduct was lawful. Romero v. Kitsap County, 931 F.2d 624, 627 (9th Cir. 1991). Because this immunity is an immunity from suit, rather than merely a defense to liability, the Supreme Court has stressed the importance of resolving immunity questions as early as possible in litigation. Hunter v. Bryant, -- U.S. --, 112 S.Ct. 534 (1991).

1. Plaintiff's Conduct Was Discretionary.

In general, only discretionary conduct by government officials is entitled to qualified immunity. Harlow, 457 U.S. at 816, 102 S.Ct. at 2737. Plaintiff contends that Defendants are not entitled to qualified immunity because their conduct in searching him was not discretionary. He contends that the Defendants' alleged supervision and participation in the

search of Plaintiff as conduct governed by Cal. Penal Code § 1524(c)(2), which provides for special procedures when a search warrant is issued for documentary evidence in possession of an attorney. Plaintiff argues that, because Cal. Penal Code § 1524 is mandatory, Defendants' conduct was ministerial rather than discretionary and thus outside the scope of behavior protected by qualified immunity.

In order for Plaintiff to state a claim under 42 U.S.C. § 1983, Plaintiff must plead a violation of constitutional or federal law. Plaintiff contends this alleged violation of the state statute resulted in the deprivation of his constitutional rights. However, Plaintiff does not specify the constitutional deprivations to which the alleged violation of Cal. Penal Code § 1524 gives rise.

State law cannot be the basis for a § 1983 claim, unless the violation of the state law also results in a constitutional or federal law violation. Long v. Norris, 929 F.2d 1111, 1115 (6th Cir. 1991) noting that "although Tennessee prison regulations may create a constitutional entitlement under the due process clause of the fourteenth amendment, they cannot change the standard of analysis for constitutional issues arising under the fourth amendment.") Thus, Plaintiff's argument that Defendants have no qualified immunity on the grounds that they acted ministerially does not succeed, because he fails to state a § 1983 claim on that basis. The Court finds that Defendants' conduct was discretionary.

2. Whether Defendants Violated Clearly Established Law.

The real issue in determining whether Defendants should be entitled to qualified immunity is whether the law governing their conduct was clearly established so that a reasonable officer would have known the conduct was

unlawful. Harlow, 457 U.S. at 818, 102 S.Ct. at 2738. The threshold determination of whether the governing law was clearly established is a matter of law for the court to decide. Act Up!/Portland v. Bagley, 998 F.2d 868, 873 (9th Cir. 1993) (citing Harlow, 457 U.S. at 818, 102 S.Ct. at 2738). However, where material issues of fact are in dispute, the case must proceed to trial. Id. at 873.

a. Whether Defendants Were the Cause of the Alleged Deprivations.

Plaintiff alleges numerous constitutional violations. The first issue to be determined, however, is whether Defendants were sufficiently involved in the alleged unconstitutional conduct to be liable under § 1983. Essentially, Plaintiff alleges that Defendants proximately caused the alleged constitutional violations in two ways: a) they directed or supervised others in the unconstitutional behavior; and b) they directly participated in the second search.

i. Vicarious Liability Not a Basis for a § 1983 Claim.

Vicarious liability is not a basis for a § 1983 claim. Monell v. Dept. of Soc. Serv., 436 U.S. 658, 692, 98 S.Ct. 2018, 2036-37 (1978). However, supervision or direct participation in the unlawful conduct is a basis for liability under § 1983. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

ii. Causation Must Be Proximate.

Section 1983 further requires that a defendant's supervision or participation in the allegedly unconstitutional

conduct must be the proximate cause of the deprivation. Arnold v. Intern. Business Machines, 637 F.2d 1350, 1355 (9th Cir. 1981).

Defendants contend that Plaintiff has failed to allege any direct participation or supervision on the part of Defendants Conn and Najera. They further contend that Plaintiff fails to show that any supervision or participation by Defendants caused the alleged deprivation of Plaintiff's constitutional rights.

Plaintiff's complaint alleges that Conn directed the search of Plaintiff at the courthouse on March 21, 1994 by Special Master Oppenheim, as well as the search by Detective Zoeller, and states that Najera and Conn were not only present at the search but also "viewed" documents which were searched. It seems clear that Plaintiff's allegations, taken as true, do state facts showing direction and participation by Defendants. Moreover, it is apparent that such direction and constitutional deprivations which Plaintiff alleges. Defendants' lack of causation defense thus fails.

b. Alleged Constitutional Violations.

Plaintiff alleges a number of constitutional deprivations caused by Defendants, including substantive due process, fourth amendment, six amendment, and fourteenth amendment deprivations.

i. Fourth Amendment Violations.

a. Invalid Warrant.

Plaintiff alleges that Defendants Conn and Najera deprived him of his fourth amendment right, as incorporated

through the fourteenth amendment, to be secure from unreasonable searches by conducting a search under an invalid warrant. The warrant is invalid, Plaintiff alleges, because it contains two material misstatements of fact made with the knowledge they were false. Under Franks v. Delaware, 438 U.S. 154, 171, 98 S.Ct. 2674, 2684-85 (1978), allegations of deliberate misstatements made by the affiant to a warrant entitle the defendant to an evidentiary hearing on the validity of the warrant. The Franks standard also defines the scope of qualified immunity in civil rights actions. Branch v. Tunnell, 937 F.2d 1382, 1387 (9th Cir. 1991) (Branch I) (citing Rivera v. United States, 928 F.2d 592, 604 (2d Cir. 1991)). However, Plaintiff does not allege that the actual affiant, Detective Zoeller, made the statements with the knowledge of their falsity, or with reckless disregard of the truth, as Franks requires. 438 U.S. at 171, 98 S.Ct. at 2684.

Additionally, Defendants respond that, even if the false statements were made intentionally or in reckless disregard of the truth, there is sufficient other material in the affidavit to support a finding of probable cause, which under Franks excuses the inaccuracies. Id. at 171-72, 98 S.Ct. at 2684. Defendants point to the affidavit as containing a statement from Plaintiff's client that the primary object of the search warrant, the alleged letter, had been turned over to Plaintiff.⁴ The affidavit states that Tracy Baker, Plaintiff's client, had informed the affiant that she had turned over the Menendez correspondence to her attorney, Plaintiff. This

⁴ The affidavit and search warrant were attached to Plaintiff's complaint. Material such as subpoenas and search warrants as exhibits to plaintiff's complaint may properly be considered on a motion to dismiss. Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994) (Branch II).

statement would be enough to support the issuing of the search warrant against Plaintiff Gabbert, even without the allegedly false statements.

Thus, the warrant is valid under either of Plaintiff's arguments, and the search conducted pursuant to it is likewise valid. The search was not clearly unlawful on the grounds of an invalid warrant, and under Harlow, Conn and Najera are entitled to qualified immunity on the charge that the search under the allegedly invalid warrant violated Plaintiff's fourth amendment rights.

b. Impermissibly Broad Execution of Warrant.

Secondly, Plaintiff alleges that Oppenheim's first search violated the fourth amendment because the search went beyond the scope of the warrant.⁵ He further alleges that the second search was invalid because it was "repetitive."

The warrant authorized a search of Plaintiff for "any and all correspondence between Tracy Baker and Lyle Menendez." (Complaint, Ex. C.). Plaintiff alleges that Oppenheim's search of Plaintiff's eyeglass case, memorandum calendar, and wallet/pocketbook went beyond the scope of the warrant because such correspondence would not reasonably be expected to be within those objects.

Police may search all items which legitimately might contain the objects specified in the warrant. United States v. Grandstaff, 813 F.2d 1353, (9th Cir. 1987); United States v. Disla, 805 F.2d 1340, 1347 (9th Cir. 1986). The warrant

⁵ The following discussion of Oppenheim's search assumes, without determining, that Defendants Conn and Najera directed that search and thus were a cause of the alleged constitutional deprivation.

in question was for "correspondence." By definition, correspondence may include letters and notes on small pieces of paper. Such small pieces of paper might have been placed within Plaintiff's eyeglass case, wallet, or calendar. The search of Plaintiff therefore did not go beyond the scope of the warrant and thus was not a violation of the fourth amendment on those grounds. On these grounds, Plaintiff cannot show that the search was clearly unlawful so as to overcome Defendants' claim to qualified immunity under Harlow.

Plaintiff further alleges that the second search of his personal effects was unauthorized by the warrant because it was "repetitive" and thus violated his rights under the fourth amendment. Plaintiff cites no case law to support his proposition that such searches are unreasonable. On the contrary, courts have allowed "second" searches under the same warrant, as long as the subsequent search could be considered a continuation of the first search. United States v. Kaplan, 895 F.2d 618, 623 (9th Cir. 1990) (holding that officer who visited defendant's offices to obtain specific files was allowed to return several hours later; second entry was considered continuation of the search); United States v. Carter, 854 F.2d 1102, 1107 (8th Cir. 1988) (officer's return to a motel room, several hours after a search, was valid because the authority of the search warrant had not expired.)

The second search conducted by Zoeller on Plaintiff occurred soon after the first search conducted by Oppenheim, and thus would be considered a continuation of Oppenheim's search under Kaplan. In any event, the second search was not clearly unlawful so that a reasonable officer should have known it was illegal. The second search, like the first search, therefore does not meet the Harlow test for overcoming qualified immunity.

c. Violation of Cal. Penal Code § 1524

Plaintiff alleges that the search was unconstitutional on a third ground, because it was allegedly conducted in violation of Cal. Penal Code § 1524, as discussed above in section II.C.1. Again, a § 1983 claim must be premised on the violation of federal law or constitutional provision. Long v. Norris, 929 F.2d at 1114. The violation of Cal. Penal Code § 1524 in and of itself does not constitute a fourth amendment violation, nor does Plaintiff clearly allege that his substantive due process rights were violated by the alleged violation of the state statute. Officials sued for constitutional violations do not lose their qualified immunity in § 1983 actions merely because their conduct violates some state statutory or administrative provision. Davis v. Scherer, 468 U.S. 183, 194, 104 S.Ct. 3012, 3019 & n.12 (1984). The violating conduct must violate clearly established federal law. Elder v. Holloway, -- U.S. --, 114 S.Ct. 1019, 1023 (1994) (unanimous decision).

Even if Plaintiff alleged that Defendants' failure to follow the procedural requirements of Cal. Penal Code § 1524 constituted a fourteenth amendment deprivation, his claim would fail. While state law may create a property interest protected by the fourteenth amendment, a substantive property right cannot exist exclusively by virtue of a procedural right. Dorr v. County of Butte, 795 F.2d 875, 876, 877 (9th Cir. 1986).

ii. Intrusion into Client Relationships as a Sixth Amendment Violation

Plaintiff alleges that Defendants, by causing the search warrant to be served upon him and participating in the

search, rendered him incommunicado from his client who was simultaneously testifying before the grand jury, thereby violating his client's sixth amendment right to effective counsel.

a. **Plaintiff's Standing to Raise His Client's Sixth Amendment Claim**

Plaintiff has standing to assert his client Baker's sixth amendment claim⁶ under *Wounded Knee Legal Defense/Offense Com. v. FBI*, 507 F.2d 1281, 1284 (8th Cir. 1974) ("[A] lawyer has standing to challenge any act which interferes with his professional obligation to his client and thereby, through the lawyer, invades the client's constitutional right to counsel."); *Keker v. Proconier*, 398 F.Supp. 756, 765 (E.D. Cal. 1975) (counsel forced to meet their imprisoned clients in poor conditions had standing to raise their clients' sixth amendment claims).

b. **Interference with Attorney-Client Relationship and Prevention of Effective Counsel as a Sixth Amendment Violation**

⁶ The record does not state whether or not Baker is actually a defendant in a criminal proceeding, although it appears that she was the object of a grand jury investigation. A violation of the attorney-client privilege implicates the sixth amendment only when it applies to the relationship between a criminal defendant and his attorney. *Partington v. Gedan*, 961 F.2d 852, 863 (9th Cir. 1992).

The question here is whether, for purposes of the *Harlow* test for qualified immunity, the law governing Defendants' behavior in searching Plaintiff and arguably interfering with his client's sixth amendment right to counsel was clearly established.

Plaintiff alleges that the serving of the search warrant upon him just as his client was called to testify in front of the grand jury was an interference with his client's sixth amendment right to effective assistance of counsel. Because of the serving of the search warrant and Oppenheim's subsequent search of Plaintiff, Plaintiff claims that his client was prevented from consulting with him immediately before and during her grand jury testimony. Plaintiff argues that this constitutes a violation of the Sixth Amendment.

Leaving aside the causation question of whether Defendants Conn and Najera were actually involved in timing the service of the search warrant to interfere with Plaintiff's representation of his client, the issue is whether such alleged interference is a violation of Baker's sixth amendment right to effective counsel. Government interference with the attorney-client relationship will constitute a violation of the sixth amendment only if the interference substantially prejudices the defendant. *United States v. Irwin*, 612 F.2d 1182, 1186-1187 (9th Cir. 1980); see *United States v. Glover*, 596 F.2d 857, 863-64 (9th Cir. 1979). Plaintiff makes no allegation that his client was substantially prejudiced by his unavailability. For that reason, the law is not clearly established that Defendants' alleged interference⁷ with Plaintiff's representation of his client was unlawful.

⁷ Again, the Court assumes without determining that causation exists, even though Defendants Conn and Najera's causation of the alleged interference is far from clear.

Under Harlow, Defendants Conn and Najera are thus entitled to qualified immunity on this issue.

c. **Defendant's Contact of Plaintiff's Client as a Violation of Sixth Amendment**

Plaintiff further alleges that Defendants Conn and Najera violated his client's sixth amendment rights by questioning her during a search of her home on March 18, 1994, despite knowing that she was represented by counsel, in violation of Cal. Prof. R. Conduct 2-100 (West Supp. 1994). Cal. Prof. R. Conduct 2-100 (A) provides that:

While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

The rule has been found to apply to prosecutors pursuing a criminal case. United States v. Lopez, 4 F.3d 1455, 1459 (9th Cir. 1993). However, while Defendants Conn and Najera are bound by this rule and allegedly may have violated it, Plaintiff does not allege that this violation "substantially prejudiced" his client so that, under United States v. Irwin, his client's sixth amendment rights have been violated. Further, as discussed above, violations of state law do not provide a claim under § 1983 unless the violations in some way implicate a violation of constitutional rights.

d. **Invasion of Attorney-Client Privilege.**

Plaintiff alleges that the search of his briefcase and files invaded the attorney-client privilege because privileged

documents were viewed during the searches, and that his clients' sixth amendment rights were violated as a result. Plaintiff's allegations again fail to state a clearly established constitutional violation.⁸ "[S]tanding alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right." Partington v. Gedan, 961 F.2d 852, 863 (9th Cir. 1992) (quoting Clutchette v. Rushen, 770 F.2d 1469, 1471 (9th Cir. 1985)). Unless the interference with the attorney-client privilege substantially prejudices the defendant, an intrusion on the confidential relationship between a defendant and his attorney does not constitute a sixth amendment violation. Partington, 961 F.2d at 863; Clutchette, 770 F.2d at 1471 (citing United States v. Irwin.)

Thus, case law does not establish that Defendants' conduct was clearly a violation of the sixth amendment. Again, Plaintiff fails to allege that his client was substantially prejudiced by Defendants' alleged interference with the attorney-client privilege. Thus, under Harlow, Defendants have a qualified immunity to Plaintiff's claim.

iii. **Plaintiff's Fourteenth Amendment Right to Practice His Profession.**

Plaintiff alleges that Defendants' conduct interfered with his fourteenth amendment interest in practicing his

⁸ Plaintiff alleges that not only Baker's files but other clients' files were viewed during this search. Plaintiff's clients whose files were viewed may have a privacy interest in the files, but Plaintiff does not have standing to raise his clients' fourth amendment claims. DeMassa v. Nunez, 770 F.2d 1505, 1506, 1507 (9th Cir. 1985).

profession. Such a right has been found to exist. Kecker v. Proconier, 398 at 756; see Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972). At least one district court has found that prison officials impermissibly interfered with attorneys' fourteenth amendment rights when attorneys were forced to meet their clients in an overly warm interview room in which glass partitions hampered attorneys' ability to consult with their clients. Kecker, 398 F.Supp. at 761.

To show that a right allegedly violated is "clearly established by law" under the Harlow test.,

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 3039 (1987) (citations omitted).

Defendants' alleged plan to serve the search warrant upon Plaintiff as his client began testifying before the grand jury is arguably an interference with Plaintiff's fourteenth amendment right to practice his profession. Plaintiff contends that as a result of the serving of the search warrant and the subsequent search, he was prevented from advising his client immediately before and during the grand jury hearing, when his client specifically twice sought to consult with him. Additionally, when Plaintiff stated that his client's appearance needed to be delayed during this search, his client was instead ordered to immediately appear in front of the grand jury.

Viewing the evidence most favorably for Plaintiff on this motion to dismiss, the Court finds that Defendants did violate Plaintiff's clearly established fourteenth amendment right to practice his profession free from undue governmental interference. The Court thus **DENIES** Plaintiff's motion to dismiss this claim.

c. Substantive Due Process
"Shocks the Conscience"
Claim.

Lastly, Plaintiff claims that Defendants' conduct is so egregious that it "shocks the conscience" and violates substantive due process notions of decency and fairness. This "shock the conscience" test was first expressed in Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209 (1952), where police officers in search of evidence forcibly pumped the stomach of a criminal suspect. This type of substantive due process claim has most often been invoked in relation to police brutality and unwanted body manipulation, but has also been applied to relentless questioning of a suspect. Cooper v. Dupnik, 963 F.2d 1220, 1249, 1250 (9th Cir. 1992).

The Supreme Court has not set out specific standards for the test. Id. The Court finds here that Defendants' alleged conduct was not so lacking in decency and fairness that their actions violated Plaintiff's substantive due process right. Thus, Defendants have qualified immunity for Plaintiff's substantive due process claim.

D. Qualified Immunity No Defense to
Injunctive Relief

Qualified immunity is not a defense to a claim for injunctive relief. American Fire v. Gillespie, 932 F.2d 816, 818 (9th Cir. 1991). Plaintiff petitions for both damages and

injunctive relief. As discussed above, Plaintiff's claim for damages should be dismissed on the grounds that Defendants have qualified immunity which protects them from civil suits for damages, but Plaintiff's claim for injunctive relief is more appropriately considered on a motion for summary adjudication.

E. Leave to Amend Complaint

Fed. R. Civ. P. 15(a) states that leave to amend pleadings "shall be freely given when justice so requires." However, leave may be denied when amendment would cause undue delay, would be made in bad faith, would be futile, or would cause prejudice to the opposing party. Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973). Leave to amend need not be granted if the court determines that allegation of other facets consistent with the challenged pleading could not correct the deficiency. Albrecht v. Lund, 845 F.2d 193, 195 (9th Cir. 1988); Schreiber Dist. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986).

In this case, the Court determines that it would be futile to grant Plaintiff leave to amend his pleadings in regard to his First Claim for damages, which alleges fourth amendment violations, and his Second Claim for damages, subsections (c) (alleged violation of fourth and fourteenth amendments based on Cal. Penal Code § 1524) (e) (alleged violation of sixth and fourteenth amendment based on Cal. R. Prof. Conduct 2-100), and (f) (alleged violation of attorney-client privilege). The Court thus dismisses those claims without leave to amend.

IV. CONCLUSION

Defendants Conn and Najera's Rule 12(b)(6) motion to dismiss is hereby **DENIED** as to subsection (d) of

Plaintiff's Second Claim for the violation of his fourteenth amendment right to practice his profession, and as to Plaintiff's claims for injunctive and declaratory relief. Defendants' Rule 12(b)(6) motion to dismiss is hereby **GRANTED** on the basis of qualified immunity as to Plaintiff's remaining claims for damages against Defendants Com and Najera. Plaintiff's claims for fourth amendment violations, violations of the attorney-client privilege, violations of Cal. Rule Prof. Conduct 2-100, and violations of Cal. Penal Code § 1524 are **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

/s/ RONALD S W LEW
RONALD S.W. LEW
UNITED STATES DISTRICT JUDGE

Dated: September 27, 1994

CV 94-4227-RSWL Gabbert v. Conn, Najera et al.,
Defendants Conn and Najera' 12(b)(6) motion to dismiss.

(Gabbert1.order/j)

FILED
FEB 8 1995
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,)	
)	
Plaintiff,	)	CV 94-4227-RSWL (Ex)
)	
vs.)	
	)	ORDER RE:
DAVID CONN, et al.	)	LEAVE TO AMEND
)	
Defendants.)	
)	

I. Introduction

Plaintiff Paul Gabbert brings this action as a result of the police search he underwent on March 21, 1994. Gabbert, an attorney, was served with a search warrant and searched at the Beverly Hills Courthouse, where he was representing a client who was being investigated by the Los Angeles District Attorney's office. On September 27, 1994, this Court dismissed with prejudice Gabbert's original complaint, except for his Fourteenth Amendment claim for interference with his right to practice his profession. Gabbert now moves for leave to file a First Amended Complaint.

II. Discussion

A. Standard for Leave to Amend

Fed. R. Civ. P. 15(a) allows a party to amend its pleading once as a matter of course before the pleading is served. Plaintiff's complaint has already been served. Rule 15(a) further provides that after service,

a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Denial of leave to amend a complaint is proper only when amendment would be futile, frivolous, unduly prejudicial, would cause undue delay, or is made in bad faith. Schlacter-Jones v. General Telephone, 936 F.2d 435, 443 (9th Cir. 1991); United Union of Roofers v. Insurance Corp. of America, 919 F.2d 1398, 1402 (9th Cir. 1990); Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973).

Plaintiff seeks to amend his complaint to add a state cause of action under Cal. Penal Code § 1524 against Defendants Conn, Najera, Zoeller and Oppenheim as individuals, and against the County of Los Angeles and the City of Beverly Hills. Defendants Conn and Najera, the district attorneys allegedly involved in the search at issue, oppose this motion for leave to amend. Defendant Zoeller, the Beverly Hills Police detective allegedly involved in the search, has also filed an opposition to Plaintiff's motion for leave to amend his complaint.

Defendants oppose the motion on the grounds that Plaintiff's Fourteenth Amendment claim is based in part on events leading up to the March 21, 1994 search, and that this Court clearly dismissed with prejudice any such claims. Moreover, defendants contend that Plaintiff's attempt to

amend his complaint is futile because no cause of action exists under §1524.

B. Plaintiff Does Not Attempt to Reiterate Previously Dismissed Claims

Inasmuch as Plaintiff attempts to base his Fourteenth Amendment claim on events preceding the March 21, 1994 search, this Court has dismissed such claims with prejudice, however, to the extent that Plaintiff alleges those preceding events as factual background, rather than as grounds for his remaining Fourteenth Amendment claim, this Court will allow the allegations.

C. The Court Declines to Exercise Supplemental Jurisdiction Over Plaintiff's State Law Claim

Under California law, a public entity may be held civilly liable only under a statute imposing liability. Cal. Gov't Code § 815; Swaner v. City of Santa Monica, 150 Cal.App.3d 789, 797, 198 Cal.Rptr. 208, 212-13 (Cal. App. 2 Dist. 1984). Cal. Gov't Code § 950.2 further provides that an action against the employer would be barred. The liability of the individual defendants, as well as the liability of the City of Beverly Hills and County of Los Angeles, therefore depends on a finding of public entity liability.

Plaintiff here asserts a claim under Cal. Penal Code §1524 (c), which provides that special procedures must be followed when searches are conducted pursuant to search warrants issued for documentary evidence in the possession of a lawyer. Defendants argue that Cal. Penal Code § 1524 is merely procedural and imposes no civil liability. Cal. Gov't Code § 815.6 provides that

Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

Thus, in order to determine whether Plaintiff can state a claim under Cal. Penal Code § 1524, the Court must analyze that section under the requirements of Cal. Gov't Code § 815.6. Plaintiff cites no cases in which California courts have implied a civil cause of action under Cal. Penal Code § 1524, nor has this Court located any such cases. Thus, the question of whether a cause of action arises under Cal. Penal Code § 1524 is a novel question of state law. Under 28 U.S.C. §1367(c), a district court may decline to exercise supplemental jurisdiction if

(1) the claim raises a novel or complex issue of State law: [or]

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction.

This claim presents a question of unsettled state law, and the Court may therefore decline to exercise jurisdiction over Plaintiff's Cal. Penal Code §1524 claim. O'Connor v. State of Nevada, 27 F.3d 357, 363 (9th Cir. 1994); see Medrano v. City of Los Angeles, 973 F.2d 1499, 1507 (9th Cir. 1992), cert. denied, -- U.S. --, 113, S. Ct. 2415 (1993); see generally, Executive Software v. U.S. Dist. Court, 24 F.3d 1545, 1552-61 (9th Cir. 1994). Moreover, it is clear that this purported state claim substantially predominates over the one remaining federal claim in this case. On both grounds, this Court declines to exercise supplemental jurisdiction over Plaintiff's § 1524 claim. This Court thus DENIES Plaintiff's

motion for leave to amend his complaint as to the Cal. Penal Code § 1524 claim.

III. Conclusion

This Court thus declines to exercise supplemental jurisdiction over Plaintiff's Cal. Penal Code § 1524 claim because such a claim both presents a novel question of California law and, in addition, substantially predominates over the Plaintiff's one federal claim. On those grounds, this Court DENIES Plaintiff's motion for leave to amend his complaint as to that state claim.

IT IS SO ORDERED.

/s/ RONALD S W LEW
RONALD S. W. LEW
United States District Judge

Dated: February 8, 1995

CV 94-4227-RSWL Gabbert v. Conn, Najera et al.,
Plaintiff's motion for leave to amend complaint.

(Gabbert.lva/j)

I HEREBY CERTIFY THAT THIS DOCUMENT
WAS SERVED BY FIRST CLASS MAIL,
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PARTIES) AT THEIR RESPECTIVE MOST
RECENT ADDRESSES OF RECORD IN THIS
ACTION ON THIS DATE.

DATED: 2/8/95

/s/ Helen G. Fagan
DEPUTY CLERK

C-5

LODGED
CLERK, U.S. DISTRICT COURT
AUG 31 1995
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

FILED
OCT 3 1995
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
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D-1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,)
) CASE NO. CV 94-
) 4227-RSWL (Ex)
 Plaintiff,)
) SEPARATE
 vs.) STATEMENT OF
) UNCONTROVERTED
) MATERIAL FACTS
 DAVID CONN, CAROL)
 NAJERA, ELLIOT) AND CONCLUSIONS
 OPPENHEIM, LESLIE) OF LAW
 ZOELLER AND DOES 1)
 through X.)
) DATE: SEPTEMBER
) 25, 1995
 Defendants.) TIME: 9:00 A.M.
) COURTROOM:

TO PLAINTIFF PAUL GABBERT AND YOUR
ATTORNEY OF RECORD:

Defendants David Conn and Carol Najera hereby
submit the attached statement of uncontroverted material facts
and conclusions of law.

Uncontroverted Material Facts

Supporting Evidence

1. On March 21, 1994, plaintiff met his client, Tracy Baker at the Los Angeles Criminal Courts building at about 7:30 a.m.

2. On March 21, 1994, plaintiff met Tracy Baker on the 13th floor where the grand jury room is located.

Exhibit "3" at page 34 of transcript.

3. Prior to Ms. Baker's testimony plaintiff knew he would not be allowed in the grand jury hearing room with her and that he had to remain outside in the waiting area.

Exhibit "3" at page 35 of transcript.

4. Plaintiff checked Tracy Baker in with the grand jury bailiff at 8:30 am. on March 21, 1994.

Exhibit "3" at page 36-37 of transcript.

5. Tracy Baker's testimony before the grand jury began at 10:54 a.m. on March 21, 1994.

Exhibit "4".

6. After Defendants Conn and Najera entered the grand jury hearing room Tracy Baker was tend before the grand jury.

Exhibit "3" at pages 50-51 of transcript.

7. Immediately after defendant Zoeller presented plaintiff with a search warrant for his person and briefcase Tracy Baker was called before the grand jury.

Exhibit "3" at pages 53 of transcript.

8. Once plaintiff was presented with the search warrant he said "we'll need a private room," and then plaintiff and Oppenheim went to a private room.

Exhibit "3" at pages 54.

9. After being presented with the warrant, plaintiff and Oppenheim went into an office space alone. Exhibit "3" at pages 55-56, 61-62 of transcript.
10. Plaintiff was only searched by Oppenheim during the first search. Exhibit "3" at pages 56-57, 67-68 of transcript.
11. While plaintiff was being searched by Oppenheim he was advised that this client wanted to speak with him. Exhibit "3" at page 57 of transcript.
12. The second search of plaintiff occurred after Oppenheim completed his search of plaintiff's briefcase. Exhibit "3" at page 69 of transcript.
13. Defendants Conn and Najera were present when the second search of plaintiff by defendant Zoeller, was commenced outside of the grand jury hearing room. Exhibit "3" at page 70 of transcript.
14. During the second search defendant Conn left and Najera stayed with Zoeller until Zoeller completed the search. Exhibit "3" at pages 70-71 of transcript.
15. Defendant Carol Najera conducted all of the examination and questioning of Tracy Baker before the grand jury. Declaration of Carol Najera at paragraphs 4-7

16. Tracy Baker was present and outside of the grand jury hearing room when Zoeller conducted the second search. Exhibit "3" at pages 71-72 of transcript.
17. The second search conducted by Zoeller on plaintiff lasted about five (5) minutes. Exhibit "3" at pages 71-72 of transcript.
18. After the second search plaintiff conferred with Tracy Baker in a private room about what she was being asked in the grand jury. Exhibit "3" at pages 73, 107-108 of transcript.
19. Plaintiff contends that the only occasion he didn't have access to his client, in his mind, was when he was being searched by Oppenheim. Exhibit "3" at pages 76-77 of transcript.
20. Plaintiff conferred with Tracy Baker before the contempt proceeding commenced in Dept. 110 before Judge Florence Marie Cooper. Exhibit "3" at pages 78 of transcript.
21. Plaintiff contends and alleges that the only time he was prevented from giving legal advice to his client on March 21, 1994 was when he was being searched by Oppenheim. Exhibit "3" at page 83 of transcript.
22. Plaintiff did not sustain any loss of earnings due to the incident. Exhibit "3" at pages 84 of transcript.

23. Plaintiff did not sustain any medical expenses due to the incident. Exhibit "3" at pages 83-84 of transcript.
24. Plaintiff never advised defendant Conn that his client (Baker) wanted to speak with him (Gabbert). Exhibit "3" at pages 99-100 of transcript.
25. On March 21, 1994 while in the courthouse cafeteria and before Tracy Baker testified before the grand jury she was given legal advice by plaintiff. Exhibit "5" at pages 43-44 of transcript.
26. After leaving the courthouse cafeteria Baker and plaintiff went to check in with the grand jury bailiff. Exhibit "5" at pages 46 of transcript.
27. While in the hallway during a 45 minute period of time before her grand jury testimony began, plaintiff gave Baker legal advice. Exhibit "5" at pages 47 of transcript.
28. When Baker entered the grand jury hearing room defendants Conn and Najera were inside of the grand jury hearing room. Exhibit "5" at pages 55 of transcript.
29. After Baker was allowed to leave the grand jury room at her request, she got an indication that she should go back in to the grand jury and assert her fifth amendment right. Exhibit "5" at pages 58-59; and 61 of transcript.

30. Tracy Baker was present and outside the grand jury room when Zoeller searched plaintiff. Exhibit "5" at pages 67-68 of transcript.
31. Tracy Baker believed plaintiff would be in the waiting area while she testified before the grand jury. Exhibit "5" at pages 68-69 of transcript.
32. After defendant Conn advised Baker she was going to be held in contempt she exited the grand jury hearing room where she observed Zoeller searching plaintiff. Exhibit "5" at pages 76, 88-89 of transcript.
33. Tracy Baker believes Zoeller searched plaintiff for about five or ten minutes while she was present. Exhibit "5" at pages 87-88 of transcript.
34. Tracy Baker believes Conn and Najera were present when Zoeller searched plaintiff. Exhibit "5" at pages 89 of transcript.
35. Zoeller did not find anything he was looking for at the conclusion of his search of plaintiff. Exhibit "5" at pages 89 of transcript.
36. Tracy Baker knew she would be questioned about Lyle Menendez before she went before the grand jury. Exhibit "5" at pages 95 of transcript.
37. On March 21, 1994, the grand jury proceedings began at 10:20 a.m. Exhibit "2" at page 1 of transcript.

38. On March 21, 1994 the grand jury proceeding was conducted for investigative purposes only and not an indictment. Exhibit "2" at pages 2-9 of transcript.

39. On March 21, 1994, Leslie Zoeller was the first person to testify before the grand jury. Exhibit "2" at page 11 of transcript.

40. Tracy Baker was called to testify before the grand jury after Leslie Zoeller. Exhibit "2" at pages 24 of transcript.

41. Tracy Baker was questioned before the grand jury by Carol Najera. Exhibit "2" at page 24 of transcript.

42. When Baker was asked before the grand jury whether she was acquainted with Lyle Menendez she asked for permissions to confer with her attorney for a moment. Exhibit "2" at page 25 of transcript.

43. Pursuant to her request Tracy Baker was allowed to leave the grand jury room to confer with her attorney. Exhibit "2" at page 25 of transcript.

44. When Tracy Baker was recalled before the grand jury and again was asked if she was acquainted with Lyle Menendez, on the advice of counsel she asserted her fifth amendment privilege. Exhibit "2" at page 26 of transcript.

45. When Ms. Baker was asked did she know Lyle Menendez in August, 1989, she again asked to confer with counsel and her request was granted and she exited the grand jury. Exhibit "2" at pages 26-27 of transcript.

46. When Tracy Baker was asked a second time, if she knew Lyle Menendez in August of 1989, she once again, based on the advice of counsel, asserted her fifth amendment rights. Exhibit "2" at page 27 of transcript.

47. When Tracy Baker was asked if she brought the documents called for in the subpoena she again asked to confer with her attorney. Exhibit "2" at page 27 of transcript.

48. After Tracy Baker's request to confer with her attorney regarding the subpoena, the grand jury recessed so that a contempt hearing could be held in Dept. 110 before Judge Florence Marie Cooper. Exhibit "2" at pages 27-31 of transcript.

49. Plaintiff attended and represented his client at the contempt proceeding in Department 110. Exhibit "2" at page 36 of transcript.

50. Tracy Baker's grand jury testimony was completed at 11:12 a.m. Exhibit "4".

- | | |
|--|---|
| 51. The contempt proceeding commenced at 11:40 a.m. | Exhibit "2" at page 33 of transcript. |
| 52. Defendants Conn and Najera did not refuse any of Tracy Baker's requests to confer with her attorney. | Declaration of Conn at paragraph 8 and Najera at paragraph 8. |
| 53. Defendant Conn and Najera did not prevent Tracy Baker from conferring with her attorney. | Declaration of Conn at paragraphs 4-8 and Najera at paragraphs 4-8. |
| 54. Defendants Conn and Najera did not deny Tracy Baker access to plaintiff. | Declaration of Conn at paragraphs 4-7 and Najera at paragraphs 4-7. |
| 55. Defendants Conn and Najera did not deny Tracy Baker access to plaintiff. | Declaration of Conn at paragraphs 4-8 and Najera at paragraphs 4-8. |
| 56. Defendants Conn and Najera did not deny plaintiff access to his client. | Declaration of Conn at paragraphs 4-8 and Najera at paragraphs 4-8. |
| 57. Defendants Conn and Najera did not prevent plaintiff from conferring with his client. | Declaration of Conn at paragraphs 4-8 and Najera at paragraphs 4-8. |

Conclusion of Law

1. A prosecutor is entitled to qualified immunity when his conduct does not violate clearly established law. Romero v. Kitsap County 931 F.2d 624 (9th Cir. 1991).
2. A prosecutor is entitled to qualified immunity even if he mistakenly violates clearly established law when his conduct is objectively reasonable under preexisting law. See Romero v. Kitsap County id.
3. Plaintiff bears the burden of proof on establishing whether the law is clearly established. See Romero v. Kitsap County id.
4. ~~A prosecutor is entitled to absolute immunity for conduct intimately associated with judicial phase of the criminal process. See Imbler v. Pachtman 424 U.S. 409 (1976).~~
5. ~~A prosecutor is entitled to absolute immunity for conduct occurring during or related to grand jury proceedings. See Gray v. Bell 712 F.2d 490 (D.C. Cir. 1983); Marlowe v. Coakley 404 F.2d 70 (9th Cir. 1968).~~
6. ~~The doctrine of vicarious liability does not apply to Section 1983 claims. See Palmer v. Sanderson 9 F.3d 1433 (9th Cir. 1994).~~
7. ~~Proximate cause is an essential element of a Section 1983 action. See Arnold v. I.B.M. 637 F.2d 1350 (9th Cir. 1981).~~

Dated: August 28, 1995 DE WITT W. CLINTON
County Counsel

By: /s/ KEVIN C. BRAZILE
KEVIN C. BRAZILE
Principal Deputy County
Counsel

Attorneys for Defendant
CONN AND NAJERA

IT IS SO ORDERED.

DATED Oct 3, 1995

/s/ RONALD S W LEW
UNITED STATES DISTRICT JUDGE

LODGED
CLERK, U.S. DISTRICT COURT
AUG 31 1995
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

FILED
OCT 3 1995
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
OCT -5 1995
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,)
) CASE NO. CV 94-
) 4227-RSWL (Ex)
)
 Plaintiff,)
)
)
 vs.) PROPOSED
) JUDGMENT
)
 DAVID CONN, CAROL)
 NAJERA, ELLIOT)
 OPPENHEIM, LESLIE)
 ZOELLER AND DOES 1)
 through X.)
)
 Defendants.)
)

IT IS HEREBY ORDERED, AJUDGED and
DECREED that the Motion for Summary Judgment by
defendants David Conn and Carol Najera shall be granted.

Dated: Oct 3, 1995 /s/ RONALD S W LEW
RONALD S.W. LEW
UNITED STATES DISTRICT
COURT JUDGE

Taxed costs in sum of \$2,578.95 against Plaintiff.

Taxed costs in sum of \$1,619.55 against Plaintiff.

FILED

FEB 2 1998

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL L. GABBERT,) No. 95-56610
) Plaintiff-Appellant,)
)
 v.) D.C. No. CV-
) 94-04227-RSWL
 DAVID CONN; CAROL NAJERA;) (Central
 LESLIE ZOELLER; ELLIOT) California)
 OPPENHEIM)
 Defendants-Appellees.) ORDER
)

Before: PREGERSON and HAWKINS, Circuit Judges, and
WEINER,* District Judge.

The panel as constituted above has voted to deny the
petition for rehearing and to reject the suggestions for
rehearing en banc.

The full court has been advised of the suggestion for
rehearing en banc and no judge of the court has called for a
vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion
for rehearing en banc is rejected.

*Honorable Charles R. Weiner, Senior United States
District Judge for the Eastern District of Pennsylvania, sitting
by designation.

2

No. 97-1802

Supreme Court, U. S.

F I L E D

AUG 14 1998

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1997

DAVID CONN and CAROL NAJERA,
Petitioners,
vs.

PAUL L. GABBERT,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court exercise its discretion to grant review where to do so would result in piecemeal litigation, in that the Petition for Certiorari raises issues related to only a portion of the case, and, regardless of the disposition of the Petition, the remaining matter will need to be resolved in the district court?
2. Should this Court exercise its discretion, and grant the Petition, where the matter involves well-settled issues of law, does not depart from "the accepted and usual course of judicial proceedings," and does not create any conflicts within and among the lower courts?
3. Should this Court exercise its discretion to grant review in a case of unique disputed facts, that are highly unlikely to ever recur, and that merit a full resolution in the district court?

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STATEMENT OF THE CASE

Procedural History

Petitioners are Los Angeles County Deputy District Attorneys; Respondent Paul Gabbert is an attorney licensed to practice law by the State of California. The Complaint in this case contains two claims against Petitioners David Conn and Carol Najera: 1) they violated the Fourth Amendment by conducting warrantless searches of Respondent Paul L. Gabbert; and 2) Petitioners' deliberately timed searches of Respondent Gabbert interfered with his ability to represent his client in violation of the Fourteenth Amendment. (1 Excerpts of Record on Appeal [ER] 1, 17, 20). The district court granted summary judgment in favor of all of the defendants as to both of Respondent's claims.¹ (1 ER 611). The court of appeals reversed the district court's ruling with respect to Petitioners Conn and Najera.

First, the court held that the Fourteenth Amendment protects an individual's right to practice his or her profession free from undue and unreasonable state interference. That right was violated here, the court concluded, when Petitioners Conn and Najera prevented Respondent from consulting with his client while she was testifying before the grand jury. Second, the court held that the Petitioners were not entitled to qualified immunity because the right

¹ Two of the defendants below, Elliot Oppenheim and Leslie Zoeller, are no longer parties to this action. The Ninth Circuit affirmed the district court's dismissal as to defendant Oppenheim; Respondent settled with defendant Zoeller.

at issue was clearly established and the Petitioners' conduct was plainly intended to violate that right. The court's decision was premised on the twin principles that: 1) a witness has an established right to consult with her attorney outside the grand jury room, and 2) privacy and freedom from intrusion is essential to the attorney-client relationship. Third, the court held that Petitioner Conn violated Respondent's Fourth Amendment rights by causing a search of Respondent's belongings in "flagrant disregard" of the terms of the warrant. Specifically, the warrant dictated that the search of Respondent be conducted only by a special master, as required under California law. However, Petitioner Conn directed a police detective to conduct the search. Fourth, and finally, because the court determined that Petitioner Conn was "clearly aware" that California law permitted only a special master to search attorneys, he was not entitled to qualified immunity.

Petitioners' challenge to the decision of the court of appeals relates exclusively to Respondent's Fourteenth Amendment claim. Respondent's Fourth Amendment claim, which was remanded to the district court after the court of appeal decision, is unaffected by this Petition for Certiorari.

Statement of Facts

At its core, this case involves what ordinarily would be seen as a commonplace, but important, occurrence in the daily routine of a criminal defense attorney: the representation of an individual who, without immunity, has been compelled, by subpoena, to appear before a local

grand jury to testify and to produce documentary evidence. The respective roles, duties, obligations, and rights of the prosecutors, government investigators, defense counsel, and the witnesses or targets of the inquiry, in this context, are well-settled. The factual setting presented here, however, is anything but ordinary. The sensational historical context in which this case arises is, of course, fortuitous. By contrast, the calculated, deliberate efforts to thwart defense counsel's ability to discharge his professional obligations to his client, undertaken by two Los Angeles prosecutors (who, according to each of the two courts below, were acting in their investigative capacities), are not. Nonetheless, the application of clearly-established constitutional rules – even in this aberrant setting – remain constant.

This matter arises out of Respondent Paul L. Gabbert's ("Gabbert") representation of Traci Baker ("Baker"), a young waitress who had been called as a defense witness in the high-profile murder trial of Erik and Lyle Menendez. The first Menendez trial resulted in a hung jury. After that trial, Petitioners David Conn ("Conn") and Carol Najera ("Najera"), both Los Angeles County Deputy District Attorneys, received information that Baker was in possession of a letter, written to her by her former boyfriend, Lyle Menendez. Petitioners believed that in this letter, Menendez instructed Baker to testify falsely at his trial. As the following events reveal, Conn and Najera were determined to obtain this letter and even more determined to win the second trial of Erik and Lyle Menendez.

Conn and Najera's initial efforts to locate the letter tracked standard investigative procedures. A subpoena

was issued compelling Baker's appearance before the grand jury on March 21, 1994. (1 ER 6). The subpoena also ordered Baker to produce any correspondence to her from Lyle Menendez. (1 ER 6). On March 17, 1994, Gabbert accepted service of the subpoena on Baker's behalf. (1 ER 6).

Having concluded that the subpoena potentially implicated Baker's Fifth Amendment rights, Gabbert, on his client's behalf, attempted to move to quash the subpoena on March 18th, the Friday before his client's scheduled Monday appearance. (1 ER 6). The motion was never ruled on. (1 ER 7). Gabbert accompanied Baker to her grand jury appearance the following Monday morning. At this pivotal juncture, Petitioners' conduct ceased being in accord with conventional, or even lawful, procedure.

Because, by Friday evening, March 18th, the motion to quash the subpoena had not been granted, Conn and Najera knew that Baker was required to appear before the grand jury on March 21st and produce whatever responsive documents she had in her possession. Nonetheless, on the evening of Friday, March 18th, Conn and Najera, accompanied by Beverly Hills Police Officers Leslie Zoeller and Stephanie Miller, personally searched Baker's apartment, looking for the Menendez letter. (1 ER 7). The letter was not found. On the morning of Baker's grand jury appearance, Conn and Najera redoubled their efforts to get the letter.

At 8:30 a.m. on Monday morning, March 21st, Baker, represented by Gabbert, checked in with the grand jury bailiff for her scheduled appearance. (1 ER 9). Waiting in the hallway outside the grand jury room, Gabbert and

Baker were approached by Conn and Najera. Petitioners engaged Gabbert in a discussion regarding a possible grant of immunity for Baker. The four went to Conn's office, purportedly to discuss further the prospect of a grant of immunity. (2 ER 345-46, 405-406). Based on his conversations with Conn and Najera that morning, Gabbert believed that Conn would prepare a draft letter of immunity for Baker.

Gabbert and Baker returned to the grand jury area to wait for Conn and Najera to bring the immunity letter. (2 ER 348-50). Instead of preparing an immunity letter, as Conn had led Gabbert to believe, Conn and Najera applied for and obtained a search warrant for the person and effects of Paul Gabbert. (2 ER 413, 418, 420, 450-51). Conn had already decided to obtain the warrant at the time Gabbert and Baker were in his office discussing the immunity issue. Conn specifically planned that the warrant would be executed just before Baker's scheduled testimony. (2 ER 425-26).

Conn and Najera stood by and watched Detective Zoeller serve Gabbert with the warrant. They also watched as Elliot Oppenheim, the special master retained to conduct the search, took Gabbert into a separate room to begin the search. (2 ER 427-28, 458). The briefcase and files that Gabbert took with him to the courthouse contained the following items:

- a) an attorney-client correspondence and document file as to Baker;
- b) two other client files containing privileged attorney-client and work-product materials;

- c) Gabbert's calendar, containing extensive handwritten entries and notes including a list of past and present client names, addresses, and telephone numbers, as well as personal information;
- d) a leather pocketbook/wallet;
- e) a Dictaphone;
- f) an eye glass case; and
- g) a tablet of paper containing, among other things, a list of "things to do" and a list of client names and corresponding information which revealed the client's billing status.

(1 ER 14).

Although Gabbert repeatedly objected to the search because his briefcase and files contained attorney-client work-product, as well as privileged attorney-client communications, Oppenheim read the contents of each file and attempted to have the files photocopied. (1 ER 14, 15). Moreover, Oppenheim questioned Gabbert about his fee arrangement with Baker, asked Gabbert for his home address, and commented about personal information he found in Gabbert's calendar which related to Gabbert's fiancé. (1 ER 16).

As the search of Gabbert was in progress, which necessarily caused Gabbert to be removed and separated from his client, Conn and Najera entered the grand jury room; Baker was then called as a witness. (2 ER 428, 430-31). Just moments before Baker was called as a witness and the search of Gabbert began, Conn asked Gabbert, in his client's presence, whether, if a determination to arrest Baker was made, Gabbert would surrender

Baker in Los Angeles or whether she would have to be arrested in Orange County. (2 ER 376, 395). Overhearing this conversation, Baker, already apprehensive due to the inherently intimidating nature of the grand jury, became unnerved. She then saw her attorney surrounded by law enforcement officials and taken away to be searched. Baker described her state of mind as follows:

Suddenly there's a search warrant. My attorney is taken away from me. And I was shaking, really upset, I don't know, I'm going to go into a room with a bunch of people I don't know that are going to ask me questions, and I don't know what I should say. So I come out looking for the only rock that I have for help, and he wasn't there. So I'm stuck with some bailiff guy and nobody sitting there. I'm not saying that to be dramatic. That is exactly how I felt.

(2 ER 395).

In response to the first question put to her before the grand jury, Baker stated that she wanted to confer with her attorney but had not been able to because he was detained by the special master. She then asked for an additional opportunity to consult with Gabbert. (2 ER 392-393). Baker, however, could not talk to her lawyer because he was still being searched. (2 ER 393). Gabbert knew that Baker wanted to consult with him; he requested that the grand jury proceedings be delayed until the search was completed so that he could fulfill his obligation to his client and be available to counsel her. (2 ER 360). This request was denied and Baker was commanded to return to the grand jury room. (2 ER 355, 357-58, 385).

Baker returned to the grand jury room, distressed and upset. (2 ER 387-90). In response to the next question put to her, Baker reiterated her request to confer with her attorney. (2 ER 516). Again, Gabbert was not available to speak with his client because he was still being searched. (2 ER 387-88). Baker was ordered back before the grand jury. (2 ER 388). She was now in an even greater state of agitation, not knowing whether she had responded to the previous question appropriately and unsure how to respond to the pending question. *Id.* In response to the third question, Baker once more sought to confer with her attorney. (2 ER 517). Upon exiting the grand jury room on this occasion, Baker was confronted with Gabbert being searched by another person – Detective Zoeller. (2 ER 389-90). While Conn initially requested that Zoeller perform an additional search of Gabbert, during the break in the grand jury proceedings, Conn personally participated in the search, as well. (2 ER 360, 389-90, 469, 488, 490-492).

Shortly thereafter, Baker, still separated from Gabbert because of the orchestrated search, was taken before the Los Angeles County Superior Court, where Conn and Najera initiated contempt proceedings relating to Baker's supposed failure to produce the subpoenaed documents. (2 ER 393). Baker was not held in contempt. Within minutes, Conn and Najera obtained yet another search warrant, this one for Gabbert's law offices. (1 ER 58).

Gabbert subsequently filed the lawsuit that underlies the instant petition.

REASONS WHY THE PETITION SHOULD BE DENIED

Standards For Granting Review

In determining whether to exercise its discretion to grant a petition for certiorari to review a decision of a United States Court of Appeals, the Supreme Court typically takes into consideration the following factors:

- a) whether a court of appeals has entered a decision in conflict with the decision of another court of appeals;
- b) whether the court of appeals has decided an important federal question in a way that conflicts with a decision by a state court of last resort;
- c) whether the court of appeals has so far departed from the accepted course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory power;
- d) whether a court of appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court; or
- e) whether a court of appeals has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court.

Sup.Ct.R. 10. A petition is rarely granted where the asserted error consists of the misapplication of a properly stated rule of law. *Id.*

As demonstrated below, this case does not implicate any of the legal questions this court traditionally reviews. There is no split among the circuit courts with respect to

the legal principles at issue in this case. The decision below does not conflict with decisions of this Court or the California Supreme Court. Finally, the court of appeals did not resolve an unanswered federal question or depart from the accepted course of judicial proceedings.

What this case does involve is the application of established legal principles to a unique and factually specific situation. In short, as will become apparent, the conduct at issue and the ensuing litigation arose in the context of, and because of, a politically motivated, high-profile murder case. The conduct complained of likely would not have otherwise occurred and likely will not occur again. Consequently, this Court should not expend its resources reviewing a matter that will never repeat itself.

1. The Principles Of Judicial Economy And The Goal Of Orderly Judicial Administration Establish That This Petition Should Not Be Granted

Piecemeal appellate review is clearly disfavored. As this Court has articulated, except in certain narrowly defined circumstances, appellate review should be limited to the adjudication of entire cases in which final judgments have been entered. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). This restriction prevents "the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in a practical consequence, but a single controversy." *Id.* Phrased another way, the "federal concept of sound judicial administration will not normally be furthered by 'having piecemeal appeals . . . instead of having the trial judge,

who sits alone and is intimately familiar with the whole case, revisit . . . the case.' " *Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162, 167 (11th Cir. 1997) (citation omitted).

If the Court grants review now, this type of piecemeal litigation is guaranteed because Respondent's Fourth Amendment claim is not a subject of this Petition, and remains to be litigated in the district court. Thus, whatever the disposition of the Petition for Certiorari, the Fourth Amendment claim will still have to be resolved below. Moreover, as the court of appeals concluded, only a complete exploration of the underlying facts will allow for an appropriate resolution of this matter. The court stated:

In the procedural posture this case comes to us, we are necessarily limited. Only the fullness of discovery and perhaps a trial on the merits can fully explore Gabbert's claims and the defendants' defenses. Defendants may be able to establish that, whatever they did, it did not materially affect Gabbert's rights. We can only say that Gabbert's claims merit full exposition and defendants' defenses complete exploration.

Gabbert v. Conn, 131 F.3d 793, 806 (9th Cir. 1997). Once there is a resolution of all claims in district court, including the Fourth Amendment claim that is unchallenged in this Petition, an additional appeal may proceed through the circuit and, perhaps, back to this Court. At that time, if review is appropriate, it could be granted. To do so now would be premature. The principles of judicial economy are far better served by allowing the district court to resolve both the Fourth and Fourteenth Amendment

issues together, and, depending on the final outcome, the losing party may then choose to appeal the entire case.

2. The Legal Principles Here Are Clearly Established; The Fortuity That These Clearly Established Issues Arose In A High Profile Murder Case Does Not Present A Special Or Important Issue For Review

The core legal issue in this case is whether case law has clearly established that an attorney has a constitutional right to practice his profession free from unreasonable governmental interference. Unquestionably, it has. It is bedrock constitutional law that the Fourteenth Amendment protects the right of individuals to engage in any of the "common occupations of life." *Truax v. Raich*, 239 U.S. 33, 41 (1915); *Meyer v. State of Nebraska*, 262 U.S. 390, 399 (1923); *Green v. McElroy*, 360 U.S. 474, 492 (1959); *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972); *In re Griffiths*, 413 U.S. 717, 722-27 (1973). Indeed, the judiciary's recognition of the right to practice one's occupation free from undue intrusion predates many of the more contemporary categories of substantive due process rights that have emerged only in the last thirty years. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (due process right of access to the courts); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (due process right to privacy). As case law also makes clear, the Constitutional right to engage in one's occupation necessarily incorporates the right to perform all aspects of one's profession, including its "day-to-day"

activities, according to the "highest standards of the profession."² See *Nyberg v. Virginia*, 495 F.2d 1342, 1344 (1974), cert. denied, 419 U.S. 891 (1974); *Keker v. Procunier*, 398 F.Supp. 756, 761 (E.D. Cal. 1975); *Young Women's Christian Ass'n of Princeton v. Kugler*, 342 F.Supp. 1048, 1055 (D.N.J. 1972), cert. denied, 415 U.S. 989 (1973). If it did not, the right to practice one's profession would be illusory – a profession manifestly consists of, and is defined by, its day-to-day activities. Teachers must be able to have a say in the curriculum they teach, *Meyer*, 262 U.S. at 400-401; doctors must be able to practice medicine according to their professional judgment, *Roe v. Wade*, 410 U.S. 113, 164-166 (1973); and lawyers must be able to have access to their clients in order to advise them. *Wounded Knee Legal Defense/Offense Comm. v. Federal Bureau of Investigation*, 507 F.2d 1281, 1284 (8th Cir. 1974); *Steinke v. Washington County*, 857 F.Supp. 55, 57 (D. Ore. 1994); *Keker v. Procunier*, 398 F.Supp. at 760, 764-65.

Contrary to Petitioners' contentions, the right to practice one's profession is not limited to situations where the individual is "either entirely prevented from working in his or her chosen profession . . . , or effectively prevented from working in any profession at all. . . ." Petition at p. 15. *Meyer v. State of Nebraska*, upon which Petitioners heavily rely, is instructive. In *Meyer*, a state statute prevented a teacher from teaching a portion

² The court of appeals observed that the precise conduct before the court need not have previously occurred for the right to be considered "clearly established." Indeed, as the court recognized, the "unusual facts of this case preclude 'the very action in question' from being clearly established." *Gabbert*, 131 F.3d at 801.

of his curriculum, *i.e.*, teaching a foreign language to students of a certain age. The teacher was not prohibited from teaching altogether. Nonetheless, the Court held that the interference with the teacher's right to practice his profession was "plain enough." 262 U.S. at 402.

Even if the standard were, as Petitioners suggest, that Respondent be completely denied the ability to practice his profession, that standard would be amply met here. At minimum, an attorney's professional obligation includes the duty, and right, to consult with his client. *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983); *Coles v. Peyton*, 389 F.2d 224, 225-26 (4th Cir. 1968), *cert. denied*, 393 U.S. 849 (1968). See also *Adams v. Balkcom*, 688 F.2d 734, 738 (11th Cir. 1982); *United States v. Porterfield*, 624 F.2d 122, 124 (10th Cir. 1980). As the Ninth Circuit observed in *Tucker*, "adequate consultation between attorney and client is an essential element of competent representation of a criminal defendant." 716 F.2d at 581. To prevent a lawyer from performing this critical function is to prevent him from practicing his profession. Clearly, denying a lawyer access to his client is functionally no less of a constitutional deprivation than it is to impede a physician from consulting with his patient. Indeed, as the Eighth Circuit opined, it may be said "[w]ith even stronger force [than for a doctor-patient relationship] that a lawyer has standing to challenge any act which interferes with his professional obligation to his client. . . ." *Wounded Knee*, 507 F.2d at 1284. See also *Keker v. Procunier*, 398 F.Supp. at 760 ("Just as the physician is entrusted by society with the enhancement and preservation of life and health, the attorney is charged with advancement

and protection of property, of liberty, and occasionally, of life.").

Perhaps nowhere is consultation with an attorney more important than when a client is brought before a grand jury, after having been informed, as here, that she is a target of the government's investigation and that an arrest might be imminent. Thus, the right of a client to consult with her attorney outside the grand jury room is clearly established. *United States v. Mandujano*, 425 U.S. 564, 581 (1976); *United States v. Plache*, 913 F.2d 1375, 1380 (9th Cir. 1990); *United States v. Schwimmer*, 882 F.2d 22, 27 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); *In re Grand Jury Proceedings*, 859 F.2d 1021, 1024 (1st Cir. 1988). The witness' right to consult with her attorney, as well as the attorney's right and obligation to carry out his professional duty, is, of course, meaningless if, at the very moment she attempts to exercise that right, the government physically prevents her from doing so by blocking her access to her attorney.

Here, Petitioners carefully orchestrated the service of the search warrant on Gabbert to coincide with the precise moment in time that Baker would be called before the grand jury. The calculated timing of their plan was effectively conceded by Petitioner Najera. She acknowledged at her deposition that she was aware, when these events occurred, that Baker had the right to consult with Gabbert during her grand jury appearance. (2 ER 443). She acknowledged, as well, that she was aware that Gabbert accompanied Baker to the courthouse for that specific reason. (2 ER 451-53). Petitioner Conn was more direct. At his deposition he stated:

But I also knew by this point [referring to the meeting with Gabbert and Baker in his office on Monday morning before Baker testified] that we would be getting a search warrant. And once we had the warrant, there might be a change of strategy on [Gabbert's] part.

(2 ER 413).³

The profound impact which Petitioners' strategy had on Baker, who had retained counsel for the very purpose of guiding her through the inquisition of which she was a target, was predictable in both nature and degree:

And I came out (of the grand jury room) and proceeded to wait for what I perceived as a considerable amount of time, although it probably wasn't, in fact. I don't know. I was super, super, super nervous, real upset because I wasn't able to see Paul. I didn't know, in fact, whether I should have asserted the Fifth Amendment on the first question, and I was waiting, again. And I don't know if you've ever had to testify before the grand jury, but making 50 people, or however many people, wait for you, constantly going out of the room made me even more upset. I was real upset waiting, and it seemed like an eternity. I recall the bailiff was there with me. And at that point – at some point, I was directed to go back into the room, that they could not wait any longer, that I had to go back into the room. And I said I needed to talk to my attorney. And I don't know if they

³ Counsel for Petitioners conceded at oral argument before the court of appeals that the timing of the search was designed to prevent Gabbert from consulting with Baker. *Gabbert*, 131 F.3d at 803, n.4.

said, "Too bad," but they said, "I'm sorry, ma'am, you have to go in." I don't know who said that to me.

(2 ER 387-88).

Petitioners' attempts to sanitize these events by claiming that Gabbert "simply chose not to speak" with Baker, that Gabbert was merely "distracted," and that, in any event, Baker was able to adequately assert her Fifth Amendment privilege, are disingenuous. To begin with, each time Baker left the grand jury room, her lawyer was being searched – first by a special master, then by a police detective, and the third time by the very same prosecutor who was investigating *her*. (2 ER 377-78, 380-82, 387-88, 389-90). Without doubt, Gabbert was required to submit to the search since the warrant appeared facially valid. At the same time, however, Gabbert was obligated both to represent Baker's interests zealously and free of conflict and to protect the confidentiality of all the client files in his briefcase – some of which related to Baker and some of which related to his other clients. *See De Massa v. Nunez*, 770 F.2d 1505, 1507-1508 (9th Cir. 1985) (attorney is obligated to protect attorney-client files from disclosure). *See also Swindler & Berlin v. United States*, ___ U.S. ___, 118 S.Ct. 2081 (1998) (noting importance of attorney-client privilege).

Here, Petitioners carefully gauged their actions to insure that Gabbert could not meet these obligations. They timed the service of the warrant to coincide with Baker's entry into the grand jury room and then, without reason or justification, refused to delay her appearance for the matter of minutes it would take for the search to

conclude. An attorney forced to protect one client's interests at the expense of another's can hardly be said to have *chosen* to have done so as Petitioners suggest.⁴

Moreover, while Baker did assert her privilege against self-incrimination in response to questioning before the grand jury, she did so not knowing what else to do. She simply hoped that it was the appropriate course to take under the circumstances, based solely on the "body language" of Gabbert, whom she attempted to view through a partially obstructed door. (2 ER 383-85). Baker's invocation of the Fifth Amendment was not based on the counsel of her attorney. In reality, Baker was reading from a card which she had brought with her to rely on if her attorney did advise her to assert the Fifth Amendment. (2 ER 386, 392). She carried the written invocation with her into the grand jury room because she was frightened and nervous and feared that she might forget the appropriate words if Gabbert instructed her to assert the Fifth Amendment. *Id.* Reading words off a card because of a guess that it is the right thing to do is not tantamount to the undertaking of an act following "adequate consultation" with your attorney. Because she was

⁴ Petitioners' argument – that the result of the government's actions in the present case is substantially equivalent to a prison bus delay – both ignores the facts and disregards the law. Petition at p. 21. Unlike Petitioners' "bus scenario," the government in this case *deliberately interfered* with an attorney's representation of his client. It is this intended interference with a clearly established right that frames the basis of the claim here. To pose an analogous hypothetical, one would have to assume that the bus delay was intentionally engineered by prosecutors to prevent one of the prisoners on that bus from receiving effective assistance of counsel.

uncounseled and unprotected, it was mere fortuity that Baker asserted her right against self-incrimination. In fact, had she failed to "guess right" and failed to invoke the Fifth Amendment as to the first question put to her, she likely would have waived her ability to do so in response to further questioning given the nature and scope of the initial question. (1 ER 15, 2 ER 516).

The Constitutional right at issue here – Gabbert's right to represent his client without arbitrary governmental interference – is not novel or unique. This Court has recognized this principle for years. The only thing novel is the extraordinary lengths to which the Petitioners went in order to violate that right. Because no special, important, or even unsettled legal issues are implicated in this matter, the Court should not grant review.

3. Because The Decision Below Turns On A Unique Set Of Facts Unlikely To Recur, Review Is Unjustified

This case arose in the context of one of the most well-publicized murder trials in recent history. The first Menendez trial resulted in a hung jury. At re-trial, the prosecutors took a "no holds barred" approach to obtaining the evidence they believed was critical to their success. The facts that underlie the Petition establish that. The Petitioners' conduct is unprecedented and likely occurred only because of the pressures of a high-profile, politically charged case. See Ted Rohrlich, *High Profile Losses Tarnish Reputation of District Attorney's Office: Prosecutors Win Most Cases, But Failures Like Menendez and McMartin Invite*

Criticism of Tactics, L.A. Times, March 6, 1994 at A1; Steve Proffitt, *Gilbert Garcetti; In Hot Seat as L.A. District Attorney*, L.A. Times, March 13, 1994 at M3. While the historical context in which the Petitioners' conduct occurred does not justify the conduct, or alter its unlawfulness, it does compel the conclusion that the situation is highly incapable of repetition.

Petitioners suggest that, because contentious disputes between prosecutors and defense counsel are commonplace events, allowing the decision below to stand will encourage defense lawyers to sue prosecutors every time a defense lawyer is unable to represent his client with complete success. There is no support for this suggestion. As a threshold matter, Petitioners' conduct does not remotely resemble the garden-variety daily conflicts between prosecutors and defense counsel (or for that matter between all litigation adversaries). Moreover, the court of appeals' decision does not inhibit a prosecutor from fulfilling the duties and obligations of his office or from using all of the legal tools in his arsenal to do so. As this Court has long recognized, a prosecutor's primary duty is to see that justice is done; a prosecutor may "strike hard blows, but not foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). Violating the United States Constitution does not further the pursuit of justice.

It is obvious that this case involves extraordinary facts. Thus, the appellate court's holding involved a limited application of established law to unique facts. The "unusual facts" of this case and the limited holding below do not portend the Petitioners' apocalyptic claim of a rush to the courthouse by disgruntled defense attorneys. As the court stated in the opinion below:

Our holding does not provide a basis for a private attorney to resist legitimate criminal procedure and litigation devices – such as search warrants or discovery requests – in cases against the government. Nor does our holding transform every violation of a client's constitutional rights into a corresponding violation of an attorney's constitutional rights. . . . [O]ur holding is narrow: a state government violates an attorney's Fourteenth Amendment rights when its officers unduly and unreasonably interfere with the attorney's right to practice his profession by preventing the attorney from offering legal assistance to the client in the very matter and at the very moment for which the lawyer was retained.

131 F.3d at 803.

Given the procedural posture and unique fact-driven nature of this case, Respondent submits that it would be inappropriate for this Court to grant the Petition. Regardless of this Court's action, factual issues will remain, as articulated by the Ninth Circuit, to be resolved by a jury in the district court. No novel legal issues arise here; this matter is one of well-settled law, and not split within the circuits. Given that, the Petition should be denied.

—♦—

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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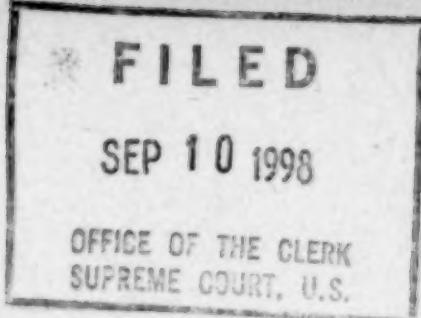
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No. 97-1802

In The Supreme Court of the United States

October Term, 1997

DAVID CONN and CAROL NAJERA, *Petitioners,*

vs.

PAUL L. GABBERT, *Respondent.*

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

**REPLY TO
BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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REPLY TO RESPONDENT'S COUNTER "QUESTIONS PRESENTED FOR REVIEW"

Respondent has chosen not to reply to the Question Presented in the Petition for Writ of Certiorari, and instead has offered three entirely different "Questions Presented For Review". Although couched as questions, these are in fact the respondent's arguments as to why the Petition for Certiorari should be denied. To those three questions, the petitioners reply as follows:

1. Granting certiorari to review this *published* opinion will in no way result in piecemeal appellate review. In fact, this is the only opportunity petitioners, or this Court, will have to review the Ninth Circuit's opinion, regardless of what happens to the rest of the case in the District Court.

2. The Ninth Circuit's decision does not reflect the simple application of "well-settled issues of law". Rather, the Court of Appeals created an entirely new cause of action, which impermissibly expands the right to practice a profession well beyond the limits defined by a long line of this Court's decisions.

3. The conclusions of law reached in the opinion below are *not* fact-specific, but rather constitute a sweeping pronouncement of law, entirely independent of the facts of the case. Whether the right "discovered" by the Ninth Circuit actually exists is a question which can only be resolved by this Court. Further, the opinion is bedrocked on the erroneous conclusion that this Court has held that a witness has an unfettered right to consult with an attorney at any time during the course of his or her testimony before a grand jury. Because other circuits have reached this same, unfounded conclusion, this Court must act to clarify the issue.

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REPLY TO RESPONDENT'S STATEMENT OF THE CASE

This case comes to this Court following the Ninth Circuit's reversal of a summary judgment that was granted to the petitioners by the District Court. Necessarily then, the objective of the trial court, as well as the Court of Appeals and this Court, was *not* to resolve disputes of fact, but rather to evaluate of the *undisputed* facts in order to determine whether those facts were sufficient to entitle the petitioners to judgment as a matter of law. Consistent with the limited role that the facts are permitted to play in this type of proceeding, the petitioners, in their statement of the facts underlying this matter (set out at pages 4-7 of the Petition for Writ of Certiorari), attempted to present, in a reasonably neutral manner, only the facts that were not in dispute,

The respondent has taken a different tack. His presentation of the facts (in his Statement of Facts at pages 2-8 of the Respondent's Brief in Opposition to Petition for Writ of Certiorari) reflects exclusively the respondent's version of events, offered in a highly partisan manner. In essence, what he has provided to this Court is an argument to a jury, rather than a foundation of undisputed facts on which to evaluate the appropriateness of the petitioners' motion for summary judgment. Furthermore, respondent's statement of the facts is misleading, in the following respects:

- 1) Respondent asserts (on page 3 of the Brief in Opposition) that "each of the two courts below" determined that the petitioners, in engaging in the conduct at issue here, "were acting in their investigative capacities" rather than in their prosecutorial roles. This is misleading, because the actions that both courts described as investigatory were *not* the conduct that forms the basis of the cause of action created by the Ninth Circuit.

The District Court and the Court of Appeals were referring to the allegations that the petitioners served and/or were present at the service of search warrants, introduced the respondent to the special master that searched him, and were present during and/or participated in searches. (See Petition at pages A-10 and B-6.) *But* the Court of Appeals found that the basis for petitioners' liability under the Fourteenth Amendment was their supposed "undu[e] and unreasonabl[e] interfere[nce] with the [respondent's] right to practice his profession by preventing [him] from offering legal assistance to [his] client in the very matter and at the very moment for which [he] was retained." (Petition, page A-17.) The petitioners allegedly accomplished this by "executing the search warrant on Gabbert at almost the exact time Baker was being haled into the grand jury room. The plain and intended result was to prevent Gabbert from consulting with Baker during her grand jury appearance." (Petition, pages A-15 through A-16; footnotes omitted.)

In other words, the petitioners' alleged misconduct was *not* in the obtaining or service of search warrants, introducing the special master to the respondent, or being present at or participating in searches. Rather, it was in exercising their *prosecutorial* powers over *when* witnesses are called to testify before a grand jury. If the search of the respondent and his client's testimony before the grand jury had not happened to overlap, there would be no conceivable basis for a Fourteenth Amendment claim by the respondent. We are here *only* because the petitioners engaged in an action which they could *only* perform in their role as *prosecutors*, not investigators.

Thus, by simply stating that both lower courts found that the petitioners were acting in their investigative, rather than prosecutorial, roles, the respondent is completely ignoring the very legal rationale offered by the Ninth Circuit

itself in support of its decision to overturn the District Court's grant of summary judgment.

2) On page 5 of the Brief in Opposition, the respondent states that the special master "took Gabbert into a separate room." In fact, that was done because the respondent himself specifically requested that the search be conducted in a private room (2 ER 352; see Petition at page 5), making this an entirely *voluntary*, not coerced, action.

3) The respondent goes on at length about the improprieties allegedly committed by the special master during his search of the respondent. (Brief in Opposition, pages 5-6.) But this is completely irrelevant to the issues before this Court, which solely involve the actions of the two prosecutors, who had no control over the manner in which the special master conducted his search of the respondent.

4) The respondent spends even more time reciting the concerns and fears Traci Baker allegedly felt while the respondent was being searched. (Brief in Opposition, pages 6-8.) But Ms. Baker is not the plaintiff here. The impact, if any, that this incident may have had on her is entirely irrelevant to the claim that *her attorney's* rights were violated by the actions of the petitioners.

5) The respondent asserts that "Baker ... could not talk to her lawyer because he was still being searched." (Brief in Opposition, page 7.) That simply is not true. As was outlined in the Petition for Writ of Certiorari (at pages 5-6), the respondent was specifically offered an opportunity to consult with Ms. Baker as soon as she requested to do so. **He refused!** The respondent did not even ask the special master to suspend the search while he consulted with his client, much less have such a request denied.

REPLY TO RESPONDENT'S STATEMENT OF REASONS WHY THE PETITION SHOULD BE DENIED

Contrary to the respondent's contention (at page 9 of the Brief in Opposition) this case *does* implicate two of "the legal questions this court traditionally reviews." The first is that "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court" (Rule 10(c)). Specifically, the Ninth Circuit erroneously concluded -- as have other Circuit Courts of Appeals -- that this Court has definitively ruled that "a witness has the right to consult with her attorney outside the grand jury room." (Petition, page A-13.)

The second reason certiorari should be granted here is that "a United States court of appeals ... has decided an important federal question in a way that conflicts with relevant decisions of this Court" (Rule 10(c)). Specifically, the Ninth Circuit, contrary to several decisions of this Court, held that a cause of action for interference with the right to practice a profession can be stated for conduct that only "interferes" with a person's ability to practice his or her profession, rather than being limited to conduct that either entirely prevents a person from engaging in a specific aspect of his or her chosen profession or prevents that person from engaging in that profession in any manner at all.

A review of the specific arguments offered by the respondent as reasons why the petition for certiorari should be denied shows that they in fact provide no substantial grounds for this Court to refuse to review this matter.

1. THIS IS THE ONLY OCCASION ON WHICH REVIEW CAN BE CONDUCTED OF THE OPINION BELOW

The first ground offered by the respondent as to why this Court should deny the Petition for Writ of Certiorari is

his claim that to grant review would result in "[p]iecemeal appellate review", because "whatever the disposition of the Petition for Writ of Certiorari, the Fourth Amendment claim [of respondent against petitioner David Conn] will still have to be resolved below." (Brief in Opposition, pages 10, 11.) But this argument ignores that the appellate review process has already begun here, and has resulted in a *published* opinion, which, unless reversed by this Court, is the law of the case and is *not* subject to any further review by either the District Court or the Ninth Circuit.

The Ninth Circuit's decision did not simply return the parties to the *status quo ante*. It constituted an explicit holding that the respondent had stated a *prima facie* case for violation of his Fourteenth Amendment right to practice his profession. Not only is the District Court precluded from revisiting that claim, but so is the Ninth Circuit under the law of the case doctrine. (See *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816-817 (1988) ; *Jeffries v. Wood*, 114 F.3d 1484, 1488-1489 (9th Cir. 1997).)

In other words, *this* decision of the Ninth Circuit is the last word on this subject. Any further proceedings in this matter, whether in the District Court or the Ninth Circuit, will have no effect on the rule laid down by the Ninth Circuit in this opinion. If that holding is to be reconsidered, it must be on the basis of a review of *this* opinion, and not some future decision that might be reached two or three years down the line on other aspects of the lawsuit.

The cases cited by respondent to support his assertion that "[p]iecemeal appellate review is clearly disfavored" (Brief in Opposition, page 10) deal with the question of whether any appeal at all should have been allowed at that point in the proceedings. But neither case implied that there is any sort of limitation on the ability of *this* Court to review matters already subjected to review by an appellate court.

This court's power of review is discretionary, and so it certainly has the option to review *published* appellate court decisions on important issues, particularly where the lower court's decision conflicts with existing Supreme Court precedents and addresses an important issue of law that has yet to be ruled upon by this Court. In short, neither "judicial economy" nor "orderly judicial administration" justifies denying this petition for writ of certiorari.

2. THE LEGAL PRINCIPLES SET OUT IN THE NINTH CIRCUIT'S OPINION ARE ENTIRELY NEW, AND ARE IN NO WAY "CLEARLY ESTABLISHED"

The second ground offered by respondent as to why this Court should deny the Petition for Writ of Certiorari is that "[t]he Constitutional right at issue here -- Gabbert's right to represent his client without arbitrary governmental interference -- is not novel or unique", and thus, "because no special, important, or even unsettled legal issues are implicated in this matter, the Court should not grant review." (Brief in Opposition, page 19.) This argument simply ignores the respondent's own contentions in this case and the rule of law announced by the Ninth Circuit in its opinion.

As the respondent recognizes (at page 15 of the Brief in Opposition), the essential underpinning of the Ninth Circuit's opinion is its conclusion that "the right of a client to consult with her attorney outside the grand jury room is clearly established." The only Supreme Court case cited in support of this proposition by either the respondent or the Ninth Circuit is *United States v. Mandujano*, 425 U.S. 564, 581 (1976). But as was shown in the Petition for Writ of Certiorari at page 17, the *Mandujano* court did *not* find such a right to exist, and a later opinion of this Court, *United States v. Williams*, 504 U.S. 36, 49 (1992), indicates that, to the contrary, this Court would most likely *deny* the existence

of such a right. Since, as both the respondent and the Ninth Circuit acknowledge, this interpretation of *Mandujano* is indispensable to the decision below, and given that other Circuit Courts of Appeal have similarly misread *Mandujano*, then under the rules of this Court review *should* be granted to definitively resolve this question.

The respondent asserts that the "case law also makes clear [that] the Constitutional right to engage in one's occupation necessarily incorporates the right to perform all aspects of one's profession, including its 'day-to-day' activities, according to the 'highest standards of the profession.'" (Brief in Opposition, page 13.) The case law says no such thing. As discussed at length in the Petition at pages 13-16, all of the relevant precedents from this Court indicate exactly the opposite. And the cases cited by the respondent deal with situations where professionals were *entirely* precluded from practicing a portion of their profession, not situations where their "day-to-day" activities were interfered with on a single occasion. E.g. *Nyberg v. City of Virginia*, 495 F.2d 1342, 1344 (8th Cir. 1974) (physicians prevented from performing *any* elective abortions at municipal hospital); and *Young Women's Christian Association v. Kugler*, 342 F.Supp. 1048, 1066 (D.N.J. 1972) (physicians had standing to challenge New Jersey's criminal abortion laws). This was also the case in *Meyer v. State of Nebraska*, 262 U.S. 390, 400-401 (1923) (on which the petitioners did *not* "heavily rely"), where the State of Nebraska *entirely* forbid teachers from engaging in certain activities. (See Petition, page 15.) The facts underlying the present case are altogether different.

The respondent goes on at length about the impact the petitioners' alleged misconduct had on the respondent's *client* (Brief in Opposition, pages 6-8, 16-19), and cites numerous cases about the importance of consultation between a lawyer and a client. But all of this goes to the rights of the *client*

to full and appropriate legal representation, *not* to the rights of the attorney to practice his or her profession. These are the cases that have language most similar to that utilized by the Ninth Circuit in the opinion below, but in each of these cases, the attorneys involved were simply acting to preserve their *clients'* right access to legal representation, *not* to vindicate their own rights. E.g. *Keker v. Procunier*, 398 F.Supp. 756, 761-763 (E.D. Cal. 1975) (challenging prison conditions that impacted the ability of inmates to have access to their lawyers; *Wounded Knee Legal Defense/Offense Committee v. Federal Bureau of Investigation*, 507 F.2d 1281, 1284 (8th Cir. 1974) (challenging FBI actions that impacted the ability of clients to receive legal assistance from their lawyers; see also *In re Grand Jury Proceedings, Des Moines, Iowa*, 568 F.2d 555, 556 (8th Cir. 1977)); *Steinke v. Washington County*, 857 F.Supp. 55, 56 (D. Oregon 1994) (attorneys' demand for injunction requiring "adequate and private space" to confer with their clients at the County Jail).

Even the cases the respondent cites for the proposition that an attorney has "the duty, and right, to consult with his client" (Brief in Opposition, page 14) — *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983); *Coles v. Peyton*, 389 F.2d 224, 225-226 (4th Cir. 1968); *Adams v. Balkcom*, 688 F.2d 734, 738 (11th Cir. 1982); and *United States v. Porterfield*, 624 F.2d 122, 124 (10th Cir. 1980) — focused on the rights of the clients, not the attorneys, in that *each* involved a claim by a criminal defendant of ineffective assistance of counsel, not a claim made by an attorney on his own behalf.

There simply are *no* cases that support the entirely new cause of action crafted by the Ninth Circuit, and, as discussed in the Petition for Writ of Certiorari, there *are* several decisions from this Court that indicates that no such cause of action can be derived from the Constitution.

3. THE DECISION BELOW IS NOT FACT-SPECIFIC, AND MAKES A BROAD CHANGE IN THE LAW

The third ground offered by the respondent as to why this Court should deny the Petition for Writ of Certiorari is that "this case involves extraordinary facts" and therefore "the appellate court's holding involved a limited application of established law to unique facts." (Brief in Opposition, page 20.) As discussed in Section 2 above, the Ninth Circuit was *not* applying established law, but rather was creating entirely new law. Further, the Ninth Circuit went out of its way to make broad statements of law. The opinion is decidedly *not* fact-specific.

But respondent's heavy emphasis on the supposedly "extraordinary facts" underlying this case (which are extraordinary only if you accept without question the respondent's version of events, including his guesses as to the motivations of the petitioners*) does point out another way in which the Ninth Circuit's opinion is a drastic departure from all prior cases even remotely like this.

The respondent attempts to minimize the potential for other lawsuits based on the Ninth Circuit's holding below by arguing that "[u]nlike Petitioners' 'bus scenario,' the government in this case *deliberately interfered* with an attorney's representation of his client. It is this *intended* interference with a clearly established right that frames the basis of the claim here." (Brief in Opposition, page 18, fn.4;

* Contary to the assertions of both the Ninth Circuit (Petition, page A-16, fn.4) and the respondent (Brief in Opposition, page 16, fn.3), the tape recording of the oral argument reveals that counsel for the petitioners did *not* concede at oral argument "that the timing of the search was designed to prevent Gabbert from consulting with Baker", as was pointed out to the Ninth Circuit in the Petition for Rehearing (at page 13, fn.3).

italics in original, other emphasis added.) But even the Ninth Circuit itself acknowledged that the standard is *supposed* to be "whether the officials' actions were *objectively* reasonable under the facts and circumstances, *without regard* to their underlying intent or motivation." (Petition, page A-14; emphasis added.)

Case law in this area is beyond merely being "clearly established". The issue in these cases is simply "Did the officials' actions comply with constitutional requirements?" Good intentions will not excuse a constitutional violation, but mere bad intentions cannot create such a violation. Here, however, the respondent is explicitly arguing that what is at issue here is not *what* the petitioners did, but rather *why* they did it. If that is the case, then the Ninth Circuit has just rejected decades of civil rights case law. If that is not what the Ninth Circuit's had in mind (and its opinion indicates that it was not [Petition, page A-14]), then, as discussed more fully in the Petition at pages 20-23, the Court of Appeals has set an impossible-to-meet standard for public officials. That standard should not be allowed to stand, at least not in its present impossibly high formulation.

CONCLUSION

For all these reasons, the petitioners urge the Court to grant the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

DATED: September ____, 1998

Respectfully submitted,

MANNING, MARDER & WOLFE

By: _____

STEVEN J. RENICK (*Counsel of Record*)

Attorneys for Petitioners

DAVID CONN and CAROL NAJERA

Supreme Court, U. S.

FILED

NOV 18 1998

CLERK

No. 97-1802

In The
Supreme Court of the United States
October Term, 1998

DAVID CONN and CAROL NAJERA,

Petitioners,

vs.

PAUL L. GABBERT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX
VOLUME I, PAGES 1 to 231

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Petition For Certiorari Filed May 4, 1998
Certiorari Granted October 5, 1998

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SUPREME COURT, U.S.

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RELEVANT DOCKET ENTRIES

U.S. District Court
Central District of California (Western Div.)

- 6/23/94 1 COMPLAINT (Summons(es) issued)
Demand for jury trial (referred to Discovery Charles F. Eick) (am) [Entry date 06/24/94]
- * * *
- 8/5/94 6 NOTICE OF MOTION AND MOTION
by defendant David Conn, defendant Carol Najera to dismiss memo of p's & a's in support of mot to dismiss; motion hearing set for 10:00 8/29/94 (bp) [Entry date 08/09/94]
- * * *
- 8/26/94 9 Opposition to defts' Conn & Najera's by
plaintiff Paul L. Gabbert to motion to dismiss [6-1] (es) [Entry date 09/07/94]
- 9/1/94 10 Reply memo of P/A in support by defendant David Conn, defendant Carol Najera to motion to dismiss [6-1] (es) [Entry date 09/13/94]
- * * *
- 9/30/94 14 ORDER by Judge Ronald S. Lew that dft's Conn & Najera's rule 12(b)(6) motion to dismiss is hereby DENIED as to subsection (d) of Plaintiff's 2nd claim for violation of his 14th Amendment right to practice his profession. Dft's rule 12(b)(6) motion to dismiss is hereby GRANTED on the basis of qualified immunity as to Plaintiff's remaining claims for damages against dft's Conn &

Najera. Pla's clais for fourth amd viola-
tions, violations of the attorney-client
privilege, violations of Cal. rule prof.
conduct 2-100, & violations of Cal. penal
code 1524 are DISMISSED WITH PREJ-
UDICE [6-1] (ENT 10/3/93) mld cpys &
ntc. (bp) [Entry date 10/03/94]

10/17/94 15 ANSWER by defendant David Conn,
defendant Carol Najera to [1-1]; jury
demand (bp) [Entry date 10/18/94]

* * *

1/9/95 22 NOTICE OF MOTION AND MOTION
by plaintiff Paul L Gabbert for leave to
file 1st A/C; Memo of p's & a's; Decl of
Melissa N. Widdifield; Exbts; motion
hearing set for 9:00 1/30/95 (mco)
[Entry date 01/17/95]

* * *

1/13/95 25 OPPOSITION by defendant Leslie
Zoeller motion for leave to file 1st A/C;
Memo of p's & a's; Decl of Melissa N.
Widdifield; Exbts [22-1] (mco) [Entry
date 01/17/95]

1/17/95 26 Memo of P/A in opposition by defen-
dant David Conn, defendant Carol
Najera to motion for leave to file 1st
A/C; Memo of p's & a's; Decl of Melissa
N. Widdifield; Exbts [22-1] (es) [Entry
date 01/19/95]

1/23/95 27 Joint Reply by plaintiff Paul L Gabbert
to oppos to motion for leave to file 1st
A/C [22-1] (jw) [Entry date 01/25/95]

* * *

2/8/95 28 ORDER by Judge Ronald S. Lew deny-
ing motion for leave to file 1st A/C;
Memo of p's & a's; Decl of Melissa N.
Widdifield; Exbts [22-1] (es) [Entry date
02/22/95]

* * *

8/31/95 38 NOTICE OF MOTION AND MOTION
by defendant David Conn, defendant
Carol Najera for summary judgment;
memo of PA; separate stmt of uncon-
troverted material facts & Conclusions
of law; decl & exhibits in support of
mot; motion hearing set for 9:00
9/25/95 (we) [Entry date 09/11/95]

8/31/95 39 DECLARATIONS AND EXHIBITS by
defendant David Conn, defendant Carol
Najera in support of their motion for
summary judgment [38-1] (we) [Entry
date 09/11/95]

* * *

9/18/95 52 DECLARATIONS by plaintiff Paul L
Gabbert in support of plf Gabbert's con-
solidated opposition to dfts motions for
summary judgment [48-1], re [38-1].
(we) [Entry date 09/27/95]

9/18/95 53 CONSOLIDATED OPPOSITION by
plaintiff Paul L Gabbert to defts motions
for summary judgment [48-1], [38-1].
(we) [Entry date 09/27/95]

9/18/95 54 EXHIBITS (we) [Entry date 09/27/95]

* * *

- 9/22/95 59 REPLY memo of PA by defendant David Conn, defendant Carol Najera & decl of David Conn. (we) [Entry date 10/03/95]
- 9/28/95 57 STIPULATION and ORDER In its ord fld 9/30/94 as to dfts David Conn & Carol Najera, shall also be ordered dismissed against dft Elliot Oppenheim as if Oppenheim as if Oppenheim has joined in the mot to dismiss brough by dft dfts Conn & Najera. It is further stipulated that any relief hereinafter obtained by plf by way of clarification or challenge to the 9/30 ord sh also apply to this stipulated dismissal of those same clms against dft Oppenheim by Judge Ronald S. Lew terminating party Elliot Oppenheim (ENT 9/29/95), mld copy (pj) [Entry date 09/29/95]
- 10/2/95 62 MINUTES: granting motion for summary judgment [48-1], granting motion for summary judgment [38-1] by Judge Ronald S. Lew CR: roger may (kr) [Entry date 10/14/95]
- 10/3/95 60 JUDGMENT AND ORDER: by Judge Ronald S. Lew against plaintiff Paul L Gabbert granting dft Zoeller and Oppenheim's motion for summary judgment [48-1]; Jgm is entered in favor of dfts and agnst pla and pla to take nothing and the actn is dismissed on the merits as to these dfts and dfts may recover their costs. terminating case (ENT 10/5/95) MD JS-6 mld cpy (lk) [Entry date 10/05/95]
- 10/3/95 61 JUDGMENT AND ORDER: by Judge Ronald S. Lew against plaintiff Paul L

Gabbert granting dft Conn & Najera motion for summary judgment [38-1] (ENT 10/5/95) (lk) [Entry date 10/05/95]

* * *

- 10/19/95 65 NOTICE OF APPEAL by plaintiff to 9th C/A from Dist. Court ord ent on 10/5/95. (cc: Paul L. Gabbert: Kevin C. Brazile: Scott D. MacLatchie). Fee: Paid. (app)
-

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 Paul L. Gabbert

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NO.
Plaintiff,	)	94-4227 ABC (ex)
vs.	)	COMPLAINT FOR
	)	VIOLATION OF
DAVID CONN, CAROL	)	CIVIL RIGHTS
NAJERA, ELLIOT	)	[42 U.S.C. § 1983]
OPPENHEIM, LESLIE	)	DEMAND FOR
ZOELLER and DOES 1	)	JURY TRIAL
through X.	)	(Filed June 23, 1994)
Defendants.)	

Plaintiff Paul L. Gabbert alleges:

JURISDICTION AND VENUE

1. This action arises under the Civil Rights Act of 1871, 42 U.S.C. § 1983, as well as the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as hereinafter more fully appears.

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343.

3. Declaratory and injunctive relief is authorized pursuant to 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 1983.

4. The unlawful practices and conduct alleged herein were committed within the Central District of California. Therefore, venue lies in this district pursuant to 28 U.S.C. § 1391(b).

PARTIES

5. Plaintiff PAUL L. GABBERT is, and at all times mentioned herein was, a citizen of the United States and a resident of the County of Los Angeles. At all relevant times mentioned herein, plaintiff GABBERT was an attorney licensed to practice law in the State of California, and was the attorney of record for Tracy L. Baker. Plaintiff GABBERT brings the instant action as an individual asserting his personal constitutional rights and in his representative and fiduciary capacity as an attorney asserting the privacy and property interests of Ms. Baker.

6. Defendant DAVID CONN is, and at all relevant times mentioned herein was, a Deputy District Attorney employed by the County of Los Angeles. The acts attributed to him herein were performed in his investigative capacity. Defendant CONN is named herein in his individual and official capacities.

7. Defendant CAROL NAJERA is, and at all relevant times mentioned herein was, a Deputy District Attorney employed by the County of Los Angeles. The

acts attributed to her herein were performed in her investigative capacity. Defendant NAJERA is named herein in her individual and official capacities.

8. Defendant ELLIOT OPPENHEIM is an attorney in the State of California. On January 1, 1994 defendant OPPENHEIM's status with the California State Bar became "inactive." At all relevant times mentioned herein defendant OPPENHEIM was a special master employed by County of Los Angeles pursuant to California Penal Code § 1524. Defendant OPPENHEIM is sued herein in his individual and official capacities.

9. Defendant LESLIE ZOELLER is, and at all relevant times mentioned herein was, a detective employed by the Beverly Hills Police Department. Defendant ZOELLER is named herein in his individual and official capacities.

10. Plaintiff is informed and believes, and upon that basis alleges, that at all times herein mentioned, defendants CONN, NAJERA, OPPENHEIM, and ZOELLER, and each of them, was the agent of the remaining defendants, and in doing the things hereinafter alleged, acted in concert with said defendants and within the scope of such agency.

11. Plaintiff GABBERT is ignorant of the true names and capacities of DOES I through X and, therefore, sues such defendants by fictitious names. Plaintiff will seek leave to amend this Complaint to allege their true names and capacities when they are ascertained. Plaintiff is informed and believes, and on that basis alleges, that defendants DOES I through V were, at all relevant times mentioned herein, agents or employees of the County of

Los Angeles and acted in concert with, and as agents of, defendants CONN, NAJERA, and OPPENHEIM and each of them.

12. Plaintiff is informed and believes, and on that basis alleges, that at all relevant times mentioned herein, DOES VI through X were agents or employees of the City of Beverly Hills and/or the Beverly Hills Police Department, and acted in concert with, and as agents of defendants CONN, NAJERA, OPPENHEIM, and ZOELLER and each of them.

13. The individual defendants and defendants DOES I through X, and each of them, acted as alleged herein, not merely as individuals, but also under color, authority, and pretense of the statutes, ordinances, regulations, customs and usages of the State of California, the County of Los Angeles, the City of Beverly Hills, and under the authority of their offices as alleged herein.

FACTS

14. Plaintiff GABBERT is an experienced criminal defense lawyer who has practiced law in the Los Angeles area since approximately 1977. He is an active member in good standing of the California State Bar.

15. On or about February 11, 1994, Tracy L. Baker, one of the witnesses in the case of *People v. Lyle Menendez*, retained plaintiff GABBERT as her attorney to provide her with legal advice and representation in connection with an investigation of Ms. Baker by the Los Angeles County District Attorney regarding her testimony in the *Menendez* matter.

16. Shortly after February 11, 1994, plaintiff GABBERT, as counsel for Ms. Baker, was contacted by telephone by defendant LESLIE ZOELLER, a detective with defendant Beverly Hills Police Department assigned to investigate the *Menendez* matter. Plaintiff GABBERT stated that he represented Ms. Baker. Plaintiff GABBERT understood from his conversation with defendant ZOELLER that he, defendant ZOELLER, and the District Attorney's Office, sought Ms. Baker's cooperation with the government in the anticipated re-trial of Mr. Menendez. Between February 11, 1994 and March 17, 1994, plaintiff GABBERT, as counsel for Ms. Baker, received additional telephone calls from defendant ZOELLER regarding the matter.

17. Between February 11, 1994, and March 15, 1994, plaintiff GABBERT, as counsel for Ms. Baker, also received telephone calls from defendant CONN. Plaintiff GABBERT communicated to defendant CONN the fact that he represented Ms. Baker. During one of the telephone conversations, defendant CONN told plaintiff GABBERT that Ms. Baker was a "target" of a grand jury investigation. Defendant CONN inquired whether Ms. Baker would agree to cooperate in the government's investigation in the *Menendez* matter. Plaintiff GABBERT told defendant CONN that he was unable at that time to respond to the inquiry. Defendant CONN requested that plaintiff GABBERT make Ms. Baker available for service of a subpoena commanding her to testify before the grand jury. Plaintiff GABBERT agreed. It was further agreed that defendant ZOELLER would serve the grand jury subpoena at plaintiff GABBERT's law office on March 17, 1994 at 12 noon.

18. In approximately the third week of February 1994, subsequent to learning that Ms. Baker was represented by plaintiff GABBERT, defendant ZOELLER appeared unannounced, with another Beverly Hills Police Department police officer, Stephanie Miller, at the home of Ms. Baker at approximately 8:30 p.m. Despite his knowledge that Ms. Baker was represented by counsel, and that counsel was not present, defendant ZOELLER attempted to question Ms. Baker as to the existence of a letter purportedly written by Mr. Menendez to Ms. Baker.

19. On Thursday, March 17, 1994, defendant ZOELLER appeared at plaintiff GABBERT's law office to serve the grand jury subpoena directed to Ms. Baker. Defendant ZOELLER advised plaintiff GABBERT of a continued interest in Ms. Baker's "cooperation" with law enforcement authorities.

20. The subpoena, attached hereto as Exhibit A, in addition to commanding Ms. Baker's appearance before the grand jury on Monday, March 21, 1994 at 8:30 a.m., also ordered her to produce at that time any correspondence from Lyle Menendez to her. Plaintiff GABBERT recognized that the subpoena's command to produce documents implicated and potentially impinged upon his client's constitutional right against compulsory self-incrimination. As the attorney for Ms. Baker, plaintiff GABBERT prepared a motion to quash the subpoena which he intended to file on Friday, March 18, 1994.

21. On Friday morning, March 18, 1994, plaintiff GABBERT telephoned defendant CONN and advised him of the constitutional basis for the motion to quash the

subpoena to Ms. Baker. Plaintiff GABBERT asked defendant CONN to continue Ms. Baker's grand jury appearance for one week, so that the motion to quash the subpoena could be fully and appropriately litigated prior to Ms. Baker's appearance before the grand jury. Defendant CONN refused.

22. Shortly thereafter, plaintiff GABBERT again telephoned defendant CONN, this time to request that he stipulate to the issuance of an order shortening time so that the motion to quash could be heard prior to Ms. Baker's grand jury appearance. Defendant CONN refused this request as well.

23. On the afternoon of Friday, March 18, 1994, plaintiff GABBERT attempted to have the motion to quash filed in the Los Angeles Superior Court. Judge James Bascue denied plaintiff GABBERT's *ex parte* application for an order shortening time and declined to accept the motion to quash for filing.

24. On Friday, March 18, 1994, shortly after plaintiff GABBERT's efforts to have his motion to quash filed, defendants CONN, NAJERA, ZOELLER, and Officer Stephanie Miller, appeared at Ms. Baker's home with a search warrant for all correspondence to or from Lyle Menendez and any other evidence which would establish a relationship between Tracy Baker and Lyle Menendez. A copy of this search warrant is attached hereto as Exhibit B.

25. Defendants CONN, NAJERA and ZOELLER and Officer Stephanie Miller proceeded to search Ms. Baker's home for approximately one and one-half hours. During

the course of the search, defendants CONN, NAJERA, ZOELLER and Officer Miller seized, among other things:

- a) two shopping bags full of letters written from private citizens to Lyle Menendez;
- b) six magazines and newspapers containing articles about the *Menendez* case;
- c) correspondence from another attorney to Tracy Baker, including the attorney's notes of her interview with Ms. Baker;
- d) photographs of Lyle Menendez; and
- e) a notebook of Ms. Baker's containing names and addresses.

In addition, defendant CONN gained access to Ms. Baker's computer and viewed information stored therein.

26. Before the search began, Ms. Baker attempted to contact her attorney, plaintiff GABBERT, by telephone, but was unsuccessful. Knowing that Ms. Baker was a target of their criminal investigation and that she was represented by counsel, and knowing further that she desired to speak with her attorney, but was unable to, defendants CONN, NAJERA and ZOELLER, nonetheless sought to elicit statements from Ms. Baker as to whether she was in possession of correspondence from Lyle Menendez. Defendant CONN also asked Ms. Baker several questions about her relationship with plaintiff GABBERT.

27. California Rule of Professional Conduct 2-100 provides that a lawyer shall not "[c]ommunicate directly or indirectly about the subject of the representation with a party the members know to be represented by another lawyer in the matter, unless the member has the prior

consent of the lawyer representing such other party or is authorized to do so by law."

28. On Monday morning, March 21, 1994, plaintiff GABBERT and Ms. Baker checked in with the grand jury bailiff on the 13th floor of the Los Angeles County Criminal Courts Building at approximately 8:30 a.m. Plaintiff GABBERT had with him a briefcase and a separate paper accordion file. The accordion file contained the pleadings relating to the motion to quash which plaintiff GABBERT had attempted to have filed on the previous Friday afternoon, as well as the file he kept regarding his representation of Ms. Baker, which contained confidential materials protected by the attorney-client privilege. Plaintiff GABBERT's briefcase also contained the following items: 1) two additional attorney-client files, 2) a calendar with plaintiff GABBERT's handwritten notes, including a list of past and present client names, 3) a leather pocket-book/wallet, containing a checkbook and credit cards, and other miscellaneous cards and papers, 4) a dictaphone, 5) an eye-glass case, 6) a tablet of paper with plaintiff GABBERT's handwritten notes, 7) a letter written to a friend by a third party, and 8) newspapers.

29. Between 8:30 and 9:00 a.m., defendants CONN and NAJERA arrived at the grand jury area. Approaching plaintiff GABBERT and pointing to the accordion file, defendant CONN said something to the effect that he saw that GABBERT had brought everything with him. Plaintiff GABBERT replied that he had with him the papers which the Court would not file on Friday. Plaintiff GABBERT then showed defendants CONN and NAJERA Judge Bascue's order denying the *ex parte* application for an order shortening time. Defendant CONN's response,

referring to Ms. Baker, was that she was still obliged to comply with the grand jury subpoena.

30. Defendant CONN then initiated a discussion concerning a possible grant of immunity to Ms. Baker in exchange for her testimony before the grand jury. Defendant CONN suggested that they (defendants CONN and NAJERA, plaintiff GABBERT and Ms. Baker) go to defendant CONN's office to discuss the matter further.

31. Defendant CONN and plaintiff GABBERT discussed a potential grant of "use" immunity for Ms. Baker. Defendant CONN agreed to have a draft "immunity letter" prepared.

32. Before plaintiff GABBERT and Ms. Baker left defendant CONN's office to return to the grand jury area on the 13th floor, defendant CONN asked plaintiff GABBERT, in Ms. Baker's presence, whether GABBERT would "surrender her" if she were indicted or whether it would be necessary to travel to Orange County to effect her arrest. Plaintiff Gabbert advised defendant CONN that if "surrender" the situation arose, he would agree to Ms. Baker.

33. Plaintiff GABBERT discussed the immunity issue further with Ms. Baker. When defendants CONN and NAJERA returned to the hallway outside the grand jury area, plaintiff GABBERT asked defendant CONN if he had the immunity letter. Defendant CONN indicated that his secretary was still typing it.

34. Moments later, the following events occurred within a short period of time:

a) Ms. Baker was called to testify before the grand jury. She said she needed to visit the restroom first. While plaintiff GABBERT was waiting for Ms. Baker, defendant NAJERA engaged him in conversation. Meanwhile, defendant CONN had entered the grand jury room.

b) As Ms. Baker returned from the restroom to begin testifying before the grand jury, defendant ZOELLER approached plaintiff GABBERT and served him with a search warrant for the persons of plaintiff GABBERT and Ms. Baker, as well as for the briefcase and packages of plaintiff GABBERT. The warrant sought correspondence between Ms. Baker and Lyle Menendez. A copy of this search warrant is attached hereto as Exhibit C. The warrant specifically stated that the search of plaintiff GABBERT was to be conducted through "special master" defendant ELLIOT OPPENHEIM.

c) At this point, defendant CONN exited the grand jury room to the foyer area where plaintiff GABBERT, Ms. Baker and defendants NAJERA and ZOELLER were standing. Defendant CONN then introduced plaintiff GABBERT to defendant ELLIOT OPPENHEIM, an attorney designated in the warrant as the special master, purportedly pursuant to California Penal Code § 1524, who would search plaintiff GABBERT's person and belongings.

35. Pursuant to the terms of California Penal Code § 1524(c)(1), at the time of "service of the warrant, the special master shall inform the party served of the specific items being sought and [] the party shall have the opportunity to provide the items requested." Section

1524(c)(2) provides that, if an attorney served with a warrant states that an "item or items should not be disclosed, they shall be sealed by the special master and taken to court for a hearing." Section 1524(e) further provides that a special master may permit the party serving the warrant to accompany the special master as he or she conducts the search. However, that party "shall not participate in the search nor shall he or she examine any of the items being searched by the special master except upon agreement of the party upon whom the warrant has been served."

36. At his request, plaintiff GABBERT was then taken to a private room by defendant OPPENHEIM. Plaintiff GABBERT's client, Ms. Baker, was left waiting with defendants CONN and NAJERA in a conference room adjacent to the grand jury room.

37. As defendant OPPENHEIM began the search, Ms. Baker was called to appear before the grand jury. Ms. Baker was frightened and confused by the scene unfolding before her and asked to consult with Mr. GABBERT. Plaintiff GABBERT was unable to advise or assist Ms. Baker because he was in the process of being searched by defendant OPPENHEIM. Plaintiff GABBERT stated that Ms. Baker's appearance needed to be delayed until the search was completed. Nonetheless, Ms. Baker was ordered to enter the grand jury room.

38. Defendant OPPENHEIM began the search by going through the paper accordion file which contained plaintiff GABBERT's attorney-client correspondence and document file as to Ms. Baker (hereinafter the "Baker file") and the pleadings in connection with the motion to

quash the grand jury subpoena. The Baker file contained attorney-client and work-product privileged material, including plaintiff GABBERT's handwritten notes of his interviews with Ms. Baker.

39. Throughout the search, plaintiff GABBERT voiced objections to defendant OPPENHEIM's search of his belongings on the grounds that the files contained attorney-client and work-product privileged information. Plaintiff GABBERT requested that defendant OPPENHEIM not view the privileged materials. During the course of the search, plaintiff GABBERT advised defendant OPPENHEIM that the only document he had with him that was potentially within the scope of the search warrant was a xeroxed copy of two pages of a three page letter purportedly written by Lyle Menendez to Ms. Baker. Plaintiff GABBERT gave this document to defendant OPPENHEIM. This document was never returned to plaintiff GABBERT. In the search warrant return, defendant ZOELLER stated that no documents were seized from plaintiff GABBERT.

40. After obtaining the only document in plaintiff GABBERT's possession arguably within the scope of the warrant, defendant OPPENHEIM continued to search through plaintiff GABBERT's accordion file and its contents. Defendant OPPENHEIM read the entire Baker file and requested permission to make a copy of plaintiff GABBERT's client interview notes. Plaintiff GABBERT refused that request.

41. After completing his search of the accordion file, defendant OPPENHEIM proceeded to search plaintiff

GABBERT's briefcase which contained, among other things, the following items:

a) two of plaintiff GABBERT's client files (other than those relating to Tracy Baker) containing privileged attorney-client and work-product materials;

b) plaintiff GABBERT's calendar, which contained extensive handwritten entries and notes, including a list of past and present client names, addresses and telephone numbers;

c) a leather pocketbook/wallet;

d) a dictaphone;

e) an eye-glass case; and

f) a tablet of paper containing, among other things, a list of "things to do" and a list of client names and corresponding information which revealed the client's billing status.

42. Defendant OPPENHEIM searched each and every item in plaintiff GABBERT's briefcase, including his calendar and the items in his pocketbook/wallet. Plaintiff GABBERT informed defendant OPPENHEIM that the two client files contained privileged communications. Defendant OPPENHEIM read the contents of each file over plaintiff GABBERT's objection. In addition, defendant OPPENHEIM questioned plaintiff GABBERT about his fee arrangement with Ms. Baker and about his home address. Defendant OPPENHEIM commented on a sheet of paper he found in plaintiff GABBERT's calendar which bore notes regarding a woman's clothing sizes; he made a remark about the apparent size of the woman's brassiere. Defendant OPPENHEIM also read the contents

of a letter he discovered, which was addressed to a friend of plaintiff GABBERT.

43. While defendant OPPENHEIM's search of plaintiff GABBERT's files and other personal belongings was under way, Ms. Baker was being interrogated before the grand jury by defendant CONN. One line of inquiry related directly to a subject matter which plaintiff GABBERT had earlier informed defendant CONN implicated Ms. Baker's Fifth Amendment right against self-incrimination. Before answering the question, Ms. Baker asked, and was permitted by the foreperson, to be excused from the grand jury in order to consult with her attorney. Because plaintiff GABBERT was in a separate room being searched by defendant OPPENHEIM, he was unable to consult with his client at that time. It was only after defendant OPPENHEIM completed his search that plaintiff GABBERT was able to listen to, speak with, and advise his client in confidence.

44. Shortly after Ms. Baker left the grand jury room, defendants CONN and NAJERA joined defendant OPPENHEIM and plaintiff GABBERT in the conference room adjacent to the grand jury room. Defendant CONN told plaintiff GABBERT that defendant OPPENHEIM had determined that nothing in the briefcase and files was privileged and that defendant ZOELLER would conduct another search of plaintiff GABBERT and the files and effects in his possession. Plaintiff GABBERT asked if the search could be momentarily delayed until his attorneys arrived. The request was denied.

45. Defendant ZOELLER proceeded to search plaintiff GABBERT's files and belongings a second time.

Defendants CONN and NAJERA observed the search and viewed the contents of the Baker file.

46. Midway through the search conducted by defendant ZOELLER, defendant CONN departed. Eventually defendants CONN and NAJERA returned to the grand jury room. After the second search was completed, Ms. Baker was commanded to return to the grand jury. The questioning of Ms. Baker then resumed.

47. Shortly thereafter, the parties proceeded to Department 110 of the Los Angeles County Superior Court for an *in camera* hearing relating to Tracy Baker's grand jury appearance. Defendant CONN advised plaintiff GABBERT that a warrant for his office had been obtained. A copy of this search warrant is attached hereto as Exhibit D.

48. The hearing in Department 110 was scheduled to take place at approximately 11:30 a.m. Plaintiff GABBERT requested that the hearing be briefly delayed until his attorneys arrived. Defendants CONN and NAJERA denied this request. While waiting to enter Dept. 110, plaintiff GABBERT and defendant OPPENHEIM conversed in the hallway. Plaintiff GABBERT asked defendant OPPENHEIM the basis for his determination that the attorney-client interview notes in plaintiff GABBERT's files were not privileged. Defendant OPPENHEIM responded to the effect that the documents themselves were neither stamped nor marked as "privileged."

FIRST CLAIM FOR RELIEF

(42 U.S.C. § 1983)

(Fourth Amendment Violation)

ALLEGATIONS AS TO ALL DEFENDANTS

49. Plaintiff realleges and incorporates herein by reference each and every allegation set forth in paragraphs 1 through 48 inclusive, of this Complaint.

50. In doing and causing the aforesaid acts, the defendants, and each of them, acting under color of the statutes, regulations and ordinances of the State of California, the County of Los Angeles and the City of Beverly Hills, negligently, recklessly, intentionally, and in bad faith deprived plaintiff GABBERT of the rights, privileges, and immunities secured and guaranteed to him by the Constitution and laws of the United States, in that defendants;

- (a) deprived plaintiff of his right to be free from unreasonable searches and seizures, as secured by the Fourth and Fourteenth Amendments by, *inter alia* searching and seizing his briefcase, files, and possessions without a valid or lawful warrant, without probable cause, and with a warrant that had been issued on the basis of an affidavit which included material misstatements and omissions of fact which had been intentionally or recklessly made and omitted by the affiant;
- (b) deprived plaintiff of his right to be free from unreasonable searches and seizures, as secured by the Fourth and Fourteenth

Amendments, in that the searches and seizures of plaintiff GABBERT's briefcase and files were unreasonably broad and general in their execution; and

- (c) deprived plaintiff of his right to be free from unreasonable searches and seizures, as secured by the Fourth and Fourteenth Amendments, by wilfully failing to comply with the statutory mandates of California Penal Code § 1524.

51. The aforementioned rights were clearly established at the time of the violations alleged, and defendants knew or reasonably should have known of plaintiff's rights and that their conduct amounted to violations of those rights.

52. By reason of and as a direct and proximate result of the aforementioned acts of the defendants, Does I through X, and each of them, plaintiff suffered and continues to suffer injury, damage, and loss including, but not limited to the following: public degradation and obloquy and injury to his reputation, as well as loss of past, present and future earnings, in an amount which will be proven at trial. In addition, plaintiff suffered and will continue to suffer from the chilling effect the defendants' conduct has had on his effective representation of Ms. Baker and other current and future clients similarly situated.

53. The aforesaid acts of the individual defendants and DOES 1 through X, and each of them were willful, wanton malicious and oppressive, thereby warranting the imposition of punitive damages.

54. Plaintiff also seeks an order from this Court enjoining defendants, and each of them, in their official capacities, from unreasonably searching and seizing him or his effects in the future, in violation of his rights pursuant to the Constitution, 42 U.S.C. § 1983, California Penal Code § 1524, and other state statutory and common law as alleged. Plaintiff has no adequate remedy at law to prevent such future harm.

55. An actual controversy has arisen between plaintiff and defendants, and each of them, relating to whether the defendants' acts constitute a violation of plaintiff's rights under the Constitution, 42 U.S.C. § 1983, California Penal Code § 1524 and state statutory and common law. Declaratory relief is necessary to resolve this controversy and to establish the rights of the parties hereto.

SECOND CLAIM FOR RELIEF

(42 U.S.C. § 1983)

(Fourteenth Amendment Violation)

ALLEGATIONS AS TO ALL DEFENDANTS

56. Plaintiff realleges and incorporates herein by reference each and every allegation set forth in paragraphs I through 48, inclusive, of this Complaint.

57. In doing and causing the aforesaid acts, the defendants, and each of them, acting under color of the statutes, regulations and ordinances of the State of California, the County of Los Angeles, and the City of Beverly Hills, further negligently, recklessly, intentionally and in bad-faith deprived plaintiff GABBERT of the rights, privileges and immunities secured and guaranteed

to him by the Constitution and laws of the United States in that defendants, and each of them, engaged in an arbitrary, capricious and unreasonable course of conduct which constituted an abuse of governmental authority and violated plaintiff's substantive due process rights under the Fourteenth Amendment as follows:

a) Defendants, course of conduct, including in particular the search of plaintiff GABBERT'S briefcase and files at the time of his client's grand jury appearance, constituted an egregious governmental interference with and intrusion into plaintiff GABBERT'S relationship with his client, and deprived plaintiff of his ability effectively to represent, assist and counsel his client, all in derogation of duties, obligations, rights and interests of plaintiff GABBERT and his client protected by the Sixth and Fourteenth Amendments; and

b)- By reason of the defendants' interference with and intrusion into plaintiff GABBERT'S relationship with his client, plaintiff GABBERT was deprived of his ability to effectively assert his client's constitutional rights against self-incrimination all in derogation of duties, obligations, rights and interests of plaintiff GABBERT and his client protected by the Fifth and Fourteenth Amendments; and

c) The searches and seizures of plaintiff GABBERT unreasonably and unjustifiably intruded upon the privacy interests of the plaintiff and his clients, including Tracy L. Baker, in privileged materials, information and attorney-client communications, all in derogation of duties, obligations, rights and interests of plaintiff GABBERT and his client protected under the

Fourth, Fifth, Sixth and Fourteenth Amendments; and

d) Defendants' course of conduct, including the searches and seizures of plaintiff GABBERT, constituted an arbitrary and capricious interference with plaintiff's right to practice his profession as an attorney, i.e., to assert and protect the rights and interests of his client, Ms. Baker, all in derogation of rights and interests protected by the Sixth and Fourteenth Amendments; and

e) Defendants' course of conduct, and in particular the interrogation of Ms. Baker without the presence of her counsel, constituted a violation of California Rule of Professional Conduct 2-100 in that the defendants, knowing Ms. Baker was represented by plaintiff, intentionally communicated with her regarding the subject matter of plaintiff's representation of Ms. Baker, thereby depriving plaintiff of his ability effectively to represent, assist and counsel his client, all in derogation of duties, obligations, rights and interests of plaintiff GABBERT and his client protected by the Sixth and Fourteenth Amendments; and

f) Defendants' course of conduct, and in particular the failure to comply with the mandates of California Penal Code § 1524, deprived plaintiff of his ability effectively to assert the attorney-client and work-product privileges on behalf of Ms. Baker, all in derogation of duties, obligations, rights and interests of plaintiff GABBERT and his client protected by the Fifth, Sixth and Fourteenth Amendments.

58. The aforementioned rights were clearly established at the time of the violations alleged, and defendants knew or reasonably should have known of plaintiff's rights and that their conduct amounted to violations of those rights.

59. By reason of and as a direct and proximate result of the aforementioned acts of the defendants, and each of them, plaintiff suffered and continues to suffer injury, damage, and loss including, but not limited to the following: public degradation and obloquy and injury to his reputation, and loss of past, present and future earnings, in an amount which will be proven at trial. In addition, plaintiff has suffered and will continue to suffer from the chilling effect the defendants' conduct has had on his effective representation of Ms. Baker and other current and future clients similarly situated.

60. Plaintiff also seeks an order from this Court enjoining defendants, and each of them, in their official capacities from disclosing or publishing in any manner any privileged or confidential information they may have learned in the course of their unlawful conduct. While monetary damages may compensate plaintiff for past harm caused by defendants, plaintiff has no adequate remedy at law to prevent such future harm.

61. An actual controversy has arisen between plaintiff and defendants, and each of them, relating to whether the defendants' acts and course of conduct constitute a violation of plaintiff's rights under the Constitution, 42 U.S.C. § 1983, California Rule of Professional Conduct 2-100, California Penal Code § 1524 and state statutory and common law. Declaratory relief is necessary to

resolve this controversy and to establish the rights of the parties hereto.

62. The aforesaid acts of the individual defendants were willful, wanton, malicious and oppressive thereby warranting the imposition of punitive damages.

WHEREFORE plaintiff prays for judgment and the following relief:

UNDER THE FIRST CLAIM FOR RELIEF

1. General and special damages according to proof;
2. Punitive damages against the individual defendants an amount sufficient to deter similar future conduct;
3. Injunctive relief against all defendants in their individual and representative capacities for the purpose of preventing any of the alleged conduct from occurring in the future.
4. A declaration that the actions of the defendants violated plaintiff's rights against unreasonable searches and seizures.
5. Costs and reasonable attorney's fees against all defendants pursuant to 42 U.S.C. § 1988; and
6. Any further relief the Court deems just and proper.

UNDER SECOND CLAIM FOR RELIEF

1. General and special damages according to proof;
2. Punitive damages against the individual defendants in their individual and representative capacities for the purpose of preventing any of the alleged conduct from occurring in the future.
3. Injunctive relief against all defendants in their individual and representative capacities for the purpose of preventing any of the alleged conduct from occurring in the future.
4. A declaration that the actions of the defendants violated plaintiff's Fifth and Sixth Amendment rights.
5. Costs and reasonable attorney's fees pursuant to 42 U.S.C. § 1988.
6. Any further relief the Court deems just and proper.

DATED: June 23, 1994

Respectfully submitted,

MICHAEL J. LIGHTFOOT
CARLA M. WOHRLE
MELISSA N. WIDDIFIELD
TALCOTT LIGHTFOOT,
VANDEVELDE WOHRLE
& SADOWSKY

/s/ Michael J. Lightfoot
By: MICHAEL J. LIGHTFOOT
Attorneys for Plaintiff
Paul L. Gabbert

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial.

DATED: June 23, 1994

Respectfully submitted,

MICHAEL J. LIGHTFOOT
CARLA M. WOEHRLE
MELISSA N. WIDDIFIELD
TALCOTT, LIGHTFOOT,
VANDEVELDE WOEHRLE
& SADOWSKY

/s/ Michael J. Lightfoot
By: MICHAEL J. LIGHTFOOT
Attorneys for Plaintiff
Paul L. Gabbert

EXHIBIT A

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

The people of the State of California:

To TRACI BAKER
c/o INVESTIGATING OFFICER

YOUR [sic] ARE COMMANDED to appear before the Grand Jury of the County of Los Angeles, State of California, at 13-303 Criminal Courts building, 210 W. Temple Street, City of Los Angeles, County and State aforesaid, on the 21st day of MARCH, 1994 at 8:30 A.m., as witness in an investigation pending before said Grant Jury, and bring with you the following documents: Any correspondence from Lyle Menendez.

Given under my hand this 16th day of MARCH, 1994

GIL GARCETTI, District Attorney
For the County of Los Angeles,
State of California

By /s/ David Conn
DAVID CONN, DDA Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

SUBPOENA
FOR THE
GRAND JURY

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

CRIMINAL INVESTIGATION

Defendant.

GIL GARCETTI

District Attorney of Los Angeles County
Los Angeles, California 90012

SHERIFF'S OFFICE)
) ss.
LOS ANGELES COUNTY)

I hereby certify that I served the within subpoena on the following named persons at the time and place herein stated in the County of Los Angeles, they being witnesses therein named, by showing the original to said witness _____ personally, and informing _____ the contents thereof, to wit:

_____ at _____ on the _____ day of _____ 19____

_____ at _____ on the _____ day of _____ 19____

_____ at _____ on the _____ day of _____ 19____

_____ at _____ on the _____ day of _____ 19____

_____ at _____ on the _____ day of _____ 19____

_____ at _____ on the _____ day of _____ 19____

_____ at _____ on the _____ day of _____ 19____

_____ at _____ on the _____ day of _____ 19____

_____ at _____ on the _____ day of _____ 19____

And further, that after due and diligent search I have been unable to find or make service of said subpoena in said County of Los Angeles on the following persons therein named as witnesses, to wit:

SHERMAN BLOCK
Sheriff of Los Angeles County
By /s/ _____
Deputy Sheriff.

Dated _____

EXHIBIT B

Search Warrant No. []

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
SEARCH WARRANT

PEOPLE OF THE STATE OF CALIFORNIA to any sheriff, policeman or peace officer in the County of Los Angeles:

PROOF, by affidavit, having been made before me by LESLIE ZOELLER, No. 99980 (name of affiant) that there is probable cause to believe that the property described herein may be found at the locations set forth herein and that it is seizable pursuant to Penal Code Section 1524 as indicated below by "X"(s) in that it:

- _____ was stolen or embezzled
- _____ was used as the means of committing a felony
- _____ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing its discovery
- XX is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

you are therefore COMMANDED to SEARCH

29041 Aloma Avenue, Apartment 110, Laguna Niguel, further described as a two-story apartment complex, light stucco with dark trim. Apartment No. 110 is a downstairs apartment in approximately [sic] the center of the complex and on the west side. The number "110" is written

on the door. Also all storage compartments, garages and trash receptacles for Apartment No. 110.

for the following property:

all letters and other correspondence to or from Lyle Menendez and any other documentary evidence or photographs of Lyle Menendez which would show an association with, or relationship between, Lyle Menendez and Tracy Baker.

and to SEIZE it if found and bring it forthwith before me, or this court, at the courthouse of this court.

GIVEN under my hand and dated this 18th day of MARCH, 1994 at 4:36 p.m.

/s/ _____
Signature of Magistrate

Judge of the Superior (~~Superior/Municipal~~) Court Los Angeles (Judicial District)

NIGHTTIME SERVICE ENDORSEMENT*

GOOD CAUSE HAVING BEEN SHOWN BY AFFIDAVIT, THIS WARRANT CAN BE SERVED AT ANY TIME OF THE DAY OR NIGHT.

n/a

Endorsement of Magistrate
for Nighttime Service

*Unless endorsed for nighttime service, this warrant can be served only between 7:00 a.m. and 10:00 p.m.

Search Warrant No. []
 STATE OF CALIFORNIA
 COUNTY OF LOS ANGELES
AFFIDAVIT FOR SEARCH WARRANT

LESLIE ZOELLER, No. 99980 (name of affiant), being sworn, says that on the basis of the information contained within this affidavit, he has probable cause to believe and does believe that the property described below is seizable pursuant to Penal Code Section 1524 in that it: (CHECK APPROPRIATE BOX OR BOXES)

- _____ was stolen or embezzled
- _____ was used as the means of committing a felony
- _____ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing its discovery
- XX is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

and that he has probable cause to believe and does believe that the described property is now located at and will be found at the locations set forth below and thus requests the issuance of a WARRANT TO SEARCH

29041 Aloma Avenue, Apartment 110, Laguna Niguel, further described as a two-story apartment complex, light stucco with dark trim. Apartment No. 110 is a downstairs apartment in approximately the center of the complex and on the west side. The number "110" is written on the

door. Also all storage compartments, garages and trash receptacles for Apartment No. 110.

for the following property:

all letters and other correspondence to or from Lyle Menendez and any other documentary evidence or photographs of Lyle Menendez which would show an association with, or relationship between, Lyle Menendez and Tracy Baker.

Your affiant says that the facts in support of the issuance of the search warrant are contained in the attached STATEMENT OF PROBABLE CAUSE which is incorporated as if fully set forth herein. Wherefore, your affiant prays that a search warrant be issued for the seizure of said property or any part thereof, at any time of the day **OR NIGHT***, good cause therefore having been shown.

/s/ Leslie Zoeller
 /s/ Leslie Zoeller
 Signature of Affiant

Subscribed and sworn to
 before me this 18th day of
 MARCH, 1994.

/s/ _____
 Signature of Magistrate

Judge of the Superior (Superior/~~Municipal~~) Court Los Angeles (Judicial District)

Prepared with the assistance of, or reviewed by:

 Deputy District Attorney

*Strike OR NIGHT if not applicable.

AFFIDAVIT

I, LESLIE ZOELLER, No. 99980, have been employed by the City of Beverly Hills Police Department as a police officer for 20 years 11 months. I have been a detective for 15 years 11 months, currently assigned to Robbery/Homicide Division. I am the Investigating Officer for the murders of Jose and Mary ("Kitty") Menendez which occurred on August 20, 1989 at 722 North Elm Drive, Beverly Hills, California.

Your affiant has interviewed in excess of 150 people in regard to the Menendez double homicide and has learned the following:

On August 20, 1989 your affiant responded to 722 North Elm Drive, Beverly Hills, and observed victims Jose and "Kitty" Menendez dead. Your affiant attended the autopsies of both decedents in which the cause of death for both was determined to be multiple shotgun blasts. Evidence observed by your affiant at the time of the crime leads to the conclusion that one or more 12 gauge shotguns were used, although no weapons have yet been recovered and no expended shells were recovered at the scene.

Sergeant Thomas Edmonds of the Beverly Hills Police Department interviewed the decedents' sons, Joseph (Lyle) and Erik Menendez, shortly after they called the police at 11:47 p.m. on August 20. Lyle and Erik indicated that on August 20, they returned home from the movies, they found their parents dead and immediately called the police.

Other evidence subsequently uncovered during the course of the investigation revealed that Erik and Lyle Menendez were involved in the murder of their parents.

Lyle Menendez was arrested for the murders of his parents on March 8, 1990. Erik Menendez surrendered to police and was arrested on March 11, 1990.

The defendants remained in custody up until they were indicted by the Los Angeles Grand Jury on December 7, 1992, an indictment which superseded the original complaint. They have also remained in custody since that time.

Trial on this matter began in June, 1993 and a mistrial was declared in January of 1994. During that trial both defendants admitted that they had killed their parents but claimed that they did so only after years of abuse from their parents. They are currently awaiting retrial for the murders.

Tracy L. Baker was called as a witness for the defense and testified before the jury on October 12, 1993. She said that she had known Lyle and Erik Menendez since October, 1988, spent time at their home during late 1988, and had dinner at their home on several occasions.

She recalled an occasion five years earlier in which she was about to have dinner with the family when something unusual occurred. She, Erik, Lyle, and Jose Menendez were together in the family dining room while Kitty Menendez was still bringing plates of food from the kitchen to the dining table.

She said that as Mrs. Menendez placed food on the table Mr. Menendez stood up and violently pushed his

plate away from himself, knocking over all sorts of glasses and condiments. He said, "what did you do to this food?" He then told Erik and Lyle to go outside and wait because they were going to go out to eat.

Lyle motioned for Tracy to go with him. She grabbed her purse and coat and went outside to the front of the house. There they got in the car; Jose drove, Erik sat in front, she and Lyle sat in the back. Kitty did not come along. Erik asked his father, "Do you think she tried something on purpose?"

They went to the Hamburger Hamlet and had dinner. There was no discussion at the restaurant about the incident and she didn't ask about it. Mr. Menendez was not upset. She found him to be "charming" that evening.

This incident was used during closing argument by the defense. This incident provided the basis for the defense to argue that Kitty was trying to poison her family. It supported the contention of the defense that Kitty was an unstable woman and capable of killing or harming her family. It supported the contention of the defendants that they killed their parents out of fear for their own safety and are therefore responsible for voluntary manslaughter, rather than the crime of murder as alleged by the prosecution.

After deliberations began in the Lyle Menendez jury trial, a letter was brought to the authorities attention, which, a handwriting expert says, was written by Lyle Menendez. Kurt Kuhn, a Beverly Hills Police Department civilian employee, who holds the title of Senior Identification Technician in charge of the Identification Bureau

of the Beverly Hills Police Department, whose responsibilities includes supervising and performing expert handwriting analysis for the Beverly Hills Police Department, compared this letter with a letter written by Lyle Menendez to a friend, Donovan Goodreau. Lyle Menendez admitted during trial that he wrote the Goodreau letter. Kuhn says that the two letters were written by one and the same person.

This newly discovered letter was first mentioned to us by an individual named Dominic Dunne. During deliberations, Mr. Dunne spoke to Deputy District Attorney Pamela Bozanich about a conversation he had previously engaged in with a woman named Norma Novelli, concerning her relationship with the defendant Lyle Menendez. While discussing with Ms. Bozanich the conversation he had engaged in with Ms. Novelli, Mr. Dunne also told Ms. Bozanich about a copy of a 2 page letter he had received, purportedly written by the defendant Lyle Menendez to a woman named Tracy Baker. He had two pages of the letter.

Ms. Tracy Baker had previously testified in Mr. Menendez's trial on his behalf, and this letter appeared to be a script for her testimony.

Based on this conversation between Mr. Dunne and DDA Bozanich, your Affiant was left with the impression that the letter came to Mr. Dunne from Ms. Novelli. On February 24, 1994, your Affiant spoke with Ms. Novelli. She explained that her first contact with the defendant Lyle Menendez came when he wrote to her to discuss an article she had written which he apparently had read while incarcerated. From this letter she and he began a

correspondence and by the summer of 1990 they were both writing each other and had exchanged phone numbers.

Your Affiant showed Ms. Novelli the two pages of the copy of the letter Mr. Dunne had spoken to Ms. Bozanich about and questioned her as to her knowledge concerning it. She said that her copy of the letter arrived in her post office box approximately 4 months ago. She said she immediately recognized the handwriting as belonging to Lyle Menendez. When asked if she had the letter, she said she still had the copy which had been sent to her. This copy included a missing third page. She gave your Affiant permission to take and copy the letter in its entirety. This copy was given to Kurt Kuhn and used for his comparison.

In this letter dated February 5, Lyle begins by telling Tracy that she should throw the letter away after she has absorbed the contents. He assures her that while what he is about to tell her may sound strange, it would be helpful to his case. He tells her that he feels she "can do it" but that if she would rather not, she should just let him know. He then tells her that the "first incident" is as follows:

"You and I had spent the day together. Mrs. Menendez had cooked dinner and it was served in the dining room. Everyone was seated except Mrs. Menendez. She was still bringing this and that in from the kitchen. You were seated next to me with your back to the . . . seated at the head of the table to my left. Erik was seated across from us. Behind Mr. Menendez were the doors that open to the foyer. All the food was on the

table. There was lots of it but you don't remember what the food was. Anyway all of a sudden Mr. Menendez said in a stern voice to Mrs. Menendez who was standing behind you, "What did you do to the food?!" There was a long silence or at least it seemed long and then Mr. Menendez shoved his plate forward, knocking over some stuff. He got up and said something like "go out and wait for me by the car boys, we're going out to eat." Then I got up immediately and said "come on Traci" and we both walked out into the foyer. Erik walked out too. You got your purse and jacket. We walked outside and stood in front of the big Mercedes. Erik and I were discussing something, whispering. You were just kind of standing there confused and embarrassed. Then Mr. Menendez came storming out of the house. He seemed upset. Either Erik or I, (you can't remember which) said to him "What's the matter Dad, you think she tried something?" As Mr. Menendez was getting into the front seat he said, "I don't know, but I don't trust her today." We all got in the car, you and I in the back seats and we drove in silence listening to some radio station. We made a right coming out of our house but you're unsure the way we went after that. Anyway we ended up parking somewhere and eating at Hamburger Hamlet. It was a big one. We all ate dinner talking about various things. Mr. Menendez was charming. He paid the bill. We drove back home. You and I stayed out front and kissed for a long time. You didn't feel you should ask about what had happened earlier. You then left in your car. It wasn't that late. You never saw Mrs. Menendez. (It had just gotten dark when we left for Hamburger Hamlet.) You

drove home still confused about what happened in the dining room although it seemed obvious Mr. Menendez thought Mrs. Menendez did something to the food. You were dying to ask me what it was all about but you just couldn't. Ok, that's the first incident. You really don't need to know anymore detail than I've provided here. It was a long time ago. It would be strange if you remembered things too well. However you do remember the statements I mentioned above very well - who said what to whom. You don't remember the unimportant conversations like what was said at Hamburger Hamlet etc. The best answer to any question you don't know the answer to is, "I don't remember." It's obvious why you remember certain things and certain statements. It was scary and confusing.

On Thursday, March 17, 1994, Tracy Baker was served with a subpoena to appear before the Los Angeles Grand Jury on Monday, March 21, 1994 at 8:30 a.m. That subpoena directed her to produce all correspondence received from the defendant Lyle Menendez. Ms. Baker was served at the offices of her attorney, Paul L. Gabbert, located at 2115 Main Street in Santa Monica, California.

On Friday, March 18, 1994, Deputy District Attorney David Conn received a telephone call from Paul Gabbert. Mr. Gabbert informed DDA Conn that on Monday Tracy Baker would be asserting her Fifth Amendment privilege not to answer questions about the letter on the grounds that such answers may tend to incriminate her. He also requested that DDA Conn agree to delay her appearance before the Grand Jury so that he could have an opportunity to challenge that portion of the subpoena which directs her to produce correspondence received from Lyle

Menendez. He explained that he believes such correspondence to be testimonial in nature and as such, it too would fall within the scope of her Fifth Amendment privilege. DDA Conn refused to postpone Tracy Baker's appearance before the Grand Jury or suspend her obligation to produce the requested documents.

The original letter has yet to be found. It was apparently written by Lyle Menendez to be received by Tracy Baker. The letter contained certain information and a request that this information be used by Tracy Baker during her testimony. It appears from her testimony that she followed the instructions in the letter. It is believed that the letter was and still is in her possession.

Also, Tracy Baker testified to a long standing personal relationship with Lyle Menendez. Based on her testimony and the contents of the letter, it appears that she and the defendant Lyle Menendez were close friends who were involved in a correspondence during Lyle's incarceration. Based on the one letter which has come to the attention of authorities, it would appear that Lyle Menendez discussed in his correspondence with Tracy Baker matters which he desired her to testify to at his trial.

Thus it is believed that a search of her premises would reveal correspondence that would tend to prove that Ms. Baker presented perjured testimony and that Lyle Menendez encouraged Tracy Baker to testify falsely.

Attached hereto and made a part of this Affidavit are Attachment A (Transcript of Tracy Baker's trial testimony) and Attachment B (copy of three page letter directed to Ms. Baker).

I have read the foregoing affidavit and I declare under penalty of perjury that it is true and correct.

Executed this 18th day of March, 1994 at Los Angeles, California.

/s/ Leslie Zoeller
LESLIE ZOELLER

SW No. 36449

**STATE OF CALIFORNIA - COUNTY OF
LOS ANGELES RETURN TO
SEARCH WARRANT**

Leslie Zoeller, #99980 being sworn, says that he/she (name of Affiant) conducted a search pursuant to the below described search warrant:

Issuing Magistrate: William Pounders

Magistrate's Court: Superior Court, Los Angeles
Judicial District

Date of Issuance: March 18, 1994

Date of Service: March 18, 1994

and searched the following:

29041 Aloma Avenue, Apartment 110, Laguna Niguel; further described as a two-story apartment complex, light stucco with dark trim. Apartment No. 110 is a downstairs apartment in approximately the center of the

complex and on the west side. The number "110" is written on the door. Also all storage compartments, garages and trash receptacles for Apartment No. 110.

and seized the items*

XX described in the attached and incorporated inventory described below:

I further swear that this is a true and detailed account of all the property taken by me pursuant to the search warrant, and that pursuant to Penal Code Sections 1528 and 1536 this property will be retained in my custody, subject to the order of this court in which the offense in respect to which the seized property is triable.

/s/ Leslie Zoeller
(Signature of Affiant)

Sworn to and subscribed before me this 24th day of March, 1994.

/s/ William R. Pounders
(Signature of Magistrate)
WILLIAM R. POUNDERS
Judge of the Superior Court, Los Angeles,
Judicial District.

*List all items seized, including those not specifically listed on the warrant.

**CITY OF BEVERLY HILLS
POLICE DEPARTMENT**

EVIDENCE AND PROPERTY RECORD

[LOGO]

Register

No. _____

Date 3/18/94 Time 2015CRIME TYPE 187 P.C.Officer/I.D. No. L. ZoellerOfficer/I.D. No. S. Miller

Arrest Case # _____

Crime Case # 890710

Other Case # _____

REFERENCE NAME(S):

BAKER, TRACI ☐ Arrestee
 ☐ Victim
 ☒ Other

CHECK FOR LATENT PRINTS:

ITEM NO.(S) _____

Property
Officer'sUse
OnlyITEM
NO.

DESCRIPTION

- | | |
|---|--|
| 1 | NEWSPAPERS W/ ARTICLES OF
"MENENDEZ MURDER" |
| 2 | 5 MAGAZINES CONTAINING "MEN-
ENDEZ MURDER" STORIES |
| 3 | LETTER DATED MARCH 5, 1993 TO
TRACI BAKER FROM JILL LANSING |

- 4 3 PAGE TYPED & HANDWRITTEN
INTERVIEW OF TRACI BAKER BY
JILL LANSING, DATED 2-25-93
- 5 (2) ENVELOPES W/"TRACI BAKER"
WRITTEN ON THEM
- 6 (5) PHOTOGRAPHS (ERIK & LYLE)
- 7 RED NOTEBOOK W/NAME &
ADDRESSES
- 8 (2) BAGS OF LETTERS TO LYLE MEN-
ENDEZ (FROM APPARENT WELL
WISHERS)

Temporary location of evidence:

Total Number Items _____

**THIS SECTION TO BE COMPLETED BY
PROPERTY OFFICER**

Taken from temporary location & placed in evidence
storage:

Date _____ Time _____

Location stored _____

By: _____

FINAL DISPOSITION OF EVIDENCE OR PROPERTY

RELEASED TO: ☐ Owner ☐ Other

Item No.(s) _____

RECEIVED BY: (Signature) _____

DATE/TIME _____

NAME: (Print) _____

RELEASED BY _____

ADDRESS: _____

AUTHORITY OF: _____

PHONE #: (____) _____

☐ Confiscated ☐ Destroyed

☐ Auctioned

Date _____

Items _____

Authority of _____ Property Officer _____

DISPO REVIEW DATE

FINAL DISPOSITION STAMP

EXHIBIT C

Search Warrant No. []

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
SEARCH WARRANT

PEOPLE OF THE STATE OF CALIFORNIA to any sheriff, policeman or peace officer in the County of Los Angeles:

PROOF, by affidavit, having been made before me by LESLIE ZOELLER, No. 99980 (name of affiant) that there is probable cause to believe that the property described herein may be found at the locations set forth herein and that it is seizable pursuant to Penal Code Section 1524 as indicated below by "X"(s) in that it:

- _____ was stolen or embezzled
- _____ was used as the means of committing a felony
- _____ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing its discovery
- X is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

you are therefore COMMANDED to SEARCH

1. The person of Paul L. Gabbert and any briefcases or packages on his person at the time of the search. Your affiant met Mr. Gabbert on March 17, 1994, is familiar with his appearance and will search Mr. Gabbert for the documents through Special Master Elliott Oppenheim.

2. The person of Tracy Baker. Your affiant knows Tracy Baker, is familiar with her appearance and will search Tracy Baker for the documents.

for the following property:

any and all correspondence between Tracy Baker and Lyle Menendez.

and to SEIZE it if found and bring it forthwith before me, or this court, at the courthouse of this court.

GIVEN under my hand and dated this 21st day of March, 1994 at 10:03 a.m.

/s/ _____
Signature of Magistrate

Judge of the Superior (Superior/~~Municipal~~) Court Los Angeles (Judicial District)

NIGHTTIME SERVICE ENDORSEMENT*

GOOD CAUSE HAVING BEEN SHOWN BY AFFIDAVIT, THIS WARRANT CAN BE SERVED AT ANY TIME OF THE DAY OR NIGHT.

n/a

Endorsement of Magistrate
for Nighttime Service

*Unless endorsed for nighttime service, this warrant can be served only between 7:00 a.m. and 10:00 p.m.

STATE OF CALIFORNIA COUNTY OF LOS ANGELES AFFIDAVIT FOR SEARCH WARRANT

LESLIE ZOELLER, No. 99980 (name of affiant), being sworn, says that on the basis of the information contained within this affidavit, he has probable cause to believe and does believe that the property described below is seizable pursuant to Penal Code Section 1524 in that it: (CHECK APPROPRIATE BOX OR BOXES)

- _____ was stolen or embezzled
- _____ was used as the means of committing a felony
- _____ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing its discovery
- X is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

and that he has probable cause to believe and does believe that the described property is now located at and will be found at the locations set forth below and thus requests the issuance of a WARRANT TO SEARCH

1. The person of Paul L. Gabbert and any briefcases or packages on his person at the time of the search. Your affiant met Mr. Gabbert on March 17, 1994, is familiar with his appearance and will search Mr. Gabbert for the documents.

2. The person of Tracy Baker. Your affiant knows Tracy Baker, is familiar with her appearance and will search Tracy Baker for the documents.

for the following property:

any and all correspondence between Tracy Baker and Lyle Menendez.

Your affiant says that the facts in support of the issuance of the search warrant are contained in the attached STATEMENT OF PROBABLE CAUSE which is incorporated as if fully set forth herein. Wherefore, your affiant prays that a search warrant be issued for the seizure of said property or any part thereof, at any time of the day **OR NIGHT***, good cause therefore having been shown.

/s/ Leslie Zoeller
Signature of Affiant

Subscribed and sworn to
before me this 21st day of
MARCH, 1994.

/s/ _____
Signature of Magistrate
WILLIAM R. POUNDERS
Judge of the Superior (Superior/~~Municipal~~) Court
Los Angeles (Judicial District)

Prepared with the assistance of, or reviewed by:

Deputy District Attorney

*Strike **OR NIGHT** if not applicable.

AFFIDAVIT

I, LESLIE ZOELLER, No. 99980, have been employed by the City of Beverly Hills Police Department as a police officer for 20 years 11 months. I have been a detective for 15 years 11 months, currently assigned to Robbery/Homicide Division. I am the Investigating Officer for the murders of Jose and Mary ("Kitty") Menendez which occurred on August 20, 1989 at 722 North Elm Drive, Beverly Hills, California.

Your affiant has interviewed in excess of 150 people in regard to the Menendez double homicide and has learned the following:

On August 20, 1989 your affiant responded to 722 North Elm Drive, Beverly Hills, and observed victims Jose and "Kitty" Menendez dead. Your affiant attended the autopsies of both decedents in which the cause of death for both was determined to be multiple shotgun blasts. Evidence observed by your affiant at the time of the crime leads to the conclusion that one or more 12 gauge shotguns were used, although no weapons have yet been recovered and no expended shells were recovered at the scene.

Sergeant Thomas Edmonds of the Beverly Hills Police Department interviewed the decedents' sons, Joseph (Lyle) and Erik Menendez, shortly after they called the police at 11:47 p.m. on August 20. Lyle and Erik indicated that on August 20, they returned home from the movies, they found their parents dead and immediately called the police.

Other evidence subsequently uncovered during the course of the investigation revealed that Erik and Lyle Menendez were involved in the murder of their parents.

Lyle Menendez was arrested for the murders of his parents on March 8, 1990. Erik Menendez surrendered to police and was arrested on March 11, 1990.

The defendants remained in custody up until they were indicted by the Los Angeles Grand Jury on December 7, 1992, an indictment which superseded the original complaint. They have also remained in custody since that time.

Trial on this matter began in June, 1993 and a mistrial was declared in January of 1994. During that trial both defendants admitted that they had killed their parents but claimed that they did so only after years of abuse from their parents. They are currently awaiting retrial for the murders.

Tracy L. Baker was called as a witness for the defense and testified before the jury on October 12, 1993. She said that she had known Lyle and Erik Menendez since October, 1988, spent time at their home during late 1988, and had dinner at their home on several occasions.

She recalled an occasion five years earlier in which she was about to have dinner with the family when something unusual occurred. She, Erik, Lyle, and Jose Menendez were together in the family dining room while Kitty Menendez was still bringing plates of food from the kitchen to the dining table.

She said that as Mrs. Menendez placed food on the table Mr. Menendez stood up and violently pushed his

plate away from himself, knocking over all sorts of glasses and condiments. He said, "what did you do to this food?" He then told Erik and Lyle to go outside and wait because they were going to go out to eat.

Lyle motioned for Tracy to go with him. She grabbed her purse and coat and went outside to the front of the house. There they got in the car; Jose drove, Erik sat in front, she and Lyle sat in the back. Kitty did not come along. Erik asked his father, "Do you think she tried something on purpose?"

They went to the Hamburger Hamlet and had dinner. There was no discussion at the restaurant about the incident and she didn't ask about it. Mr. Menendez was not upset. She found him to be "charming" that evening.

This incident was used during closing argument by the defense. This incident provided the basis for the defense to argue that Kitty was trying to poison her family. It supported the contention of the defense that Kitty was an unstable woman and capable of killing or harming her family. It supported the contention of the defendants that they killed their parents out of fear for their own safety and are therefore responsible for voluntary manslaughter, rather than the crime of murder as alleged by the prosecution.

After deliberations began in the Lyle Menendez jury trial, a letter was brought to the authorities attention, which, a handwriting expert says, was written by Lyle Menendez. Kurt Kuhn, a Beverly Hills Police Department civilian employee, who holds the title of Senior Identification Technician in charge of the Identification Bureau

of the Beverly Hills Police Department, whose responsibilities includes supervising and performing expert handwriting analysis for the Beverly Hills Police Department, compared this letter with a letter written by Lyle Menendez to a friend, Donovan Goodreau. Lyle Menendez admitted during trial that he wrote the Goodreau letter. Kuhn says that the two letters were written by one and the same person.

This newly discovered letter was first mentioned to us by an individual named Dominic Dunne. During deliberations, Mr. Dunne spoke to Deputy District Attorney Pamela Bozanich about a conversation he had previously engaged in with a woman named Norma Novelli, concerning her relationship with the defendant Lyle Menendez. While discussing with Ms. Bozanich the conversation he had engaged in with Ms. Novelli, Mr. Dunne also told Ms. Bozanich about a copy of a 2 page letter he had received, purportedly written by the defendant Lyle Menendez to a woman named Tracy Baker. He had two pages of the letter.

Ms. Tracy Baker had previously testified in Mr. Menendez's trial on his behalf, and this letter appeared to be a script for her testimony.

Based on this conversation between Mr. Dunne and DDA Bozanich, your Affiant was left with the impression that the letter came to Mr. Dunne from Ms. Novelli. On February 24, 1994, your Affiant spoke with Ms. Novelli. She explained that her first contact with the defendant Lyle Menendez came when he wrote to her to discuss an article she had written which he apparently had read while incarcerated. From this letter she and he began a-

correspondence and by the summer of 1990 they were both writing each other and had exchanged phone numbers.

Your Affiant showed Ms. Novelli the two pages of the copy of the letter Mr. Dunne had spoken to Ms. Bozanich about and questioned her as to her knowledge concerning it. She said that her copy of the letter arrived in her post office box approximately 4 months ago. She said she immediately recognized the handwriting as belonging to Lyle Menendez. When asked if she had the letter, she said she still had the copy which had been sent to her. This copy included a missing third page. She gave your Affiant permission to take and copy the letter in its entirety. This copy was given to Kurt Kuhn and used for his comparison.

In this letter dated February 5, Lyle begins by telling Tracy that she should throw the letter away after she has absorbed the contents. He assures her that while what he is about to tell her may sound strange, it would be helpful to his case. He tells her that he feels she "can do it" but that if she would rather not, she should just let him know. He then tells her that the "first incident" is as follows:

"You and I had spent the day together. Mrs. Menendez had cooked dinner and it was served in the dining room. Everyone was seated except Mrs. Menendez. She was still bringing this and that in from the kitchen. You were seated next to me with your back to the . . . seated at the head of the table to my left. Erik was seated across from us. Behind Mr. Menendez were the doors that open to the foyer. All the food was on the

table. There was lots of it but you don't remember what the food was. Anyway all of a sudden Mr. Menendez said in a stern voice to Mrs. Menendez who was standing behind you, "What did you do to the food?!" There was a long silence or at least it seemed long and then Mr. Menendez shoved his plate forward, knocking over some stuff. He got up and said something like "go out and wait for me by the car boys, we're going out to eat." Then I got up immediately and said "come on Traci" and we both walked out into the foyer. Erik walked out too. You got your purse and jacket. We walked outside and stood in front of the big Mercedes. Erik and I were discussing something, whispering. You were just kind of standing there confused and embarrassed. Then Mr. Menendez came storming out of the house. He seemed upset. Either Erik or I, (you can't remember which) said to him "What's the matter Dad, you think she tried something?" As Mr. Menendez was getting into the front seat he said, "I don't know, but I don't trust her today." We all got in the car, you and I in the back seats and we drove in silence listening to some radio station. We made a right coming out of our house but you're unsure the way we went after that. Anyway we ended up parking somewhere and eating at Hamburger Hamlet. It was a big one. We all ate dinner talking about various things. Mr. Menendez was charming. He paid the bill. We drove back home. You and I stayed out front and kissed for a long time. You didn't feel you should ask about what had happened earlier. You then left in your car. It wasn't that late. You never saw Mrs. Menendez. (It had just gotten dark when we left for Hamburger Hamlet.) You

drove home still confused about what happened in the dining room although it seemed obvious Mr. Menendez thought Mrs. Menendez did something to the food. You were dying to ask me what it was all about but you just couldn't. Ok, that's the first incident. You really don't need to know anymore detail than I've provided here. It was a long time ago. It would be strange if you remembered things too well. However you do remember the statements I mentioned above very well - who said what to whom. You don't remember the unimportant conversations like what was said at Hamburger Hamlet etc. The best answer to any question you don't know the answer to is, "I don't remember." It's obvious why you remember certain things and certain statements. It was scary and confusing.

On Thursday, March 17, 1994, Tracy Baker was served with a subpoena to appear before the Los Angeles Grand Jury on Monday, March 21, 1994 at 8:30 a.m. That subpoena directed her to produce all correspondence received from the defendant Lyle Menendez. Ms. Baker was served at the offices of her attorney, Paul L. Gabbert, located at 2115 Main Street in Santa Monica, California.

On Friday, March 18, 1994, Deputy District Attorney David Conn received a telephone call from Paul Gabbert. Mr. Gabbert informed DDA Conn that on Monday Tracy Baker would be asserting her Fifth Amendment privilege not to answer questions about the letter on the grounds that such answers may tend to incriminate her. He also requested that DDA Conn agree to delay her appearance before the Grand Jury so that he could have an opportunity to challenge that portion of the subpoena which directs her to produce correspondence received from Lyle

Menendez. He explained that he believes such correspondence to be testimonial in nature and as such, it too would fall within the scope of her Fifth Amendment privilege. DDA Conn refused to postpone Tracy Baker's appearance before the Grand Jury or suspend her obligation to produce the requested documents.

The original letter has yet to be found. It was apparently written by Lyle Menendez to be received by Tracy Baker. The letter contained certain information and a request that this information be used by Tracy Baker during her testimony. It appears from her testimony that she followed the instructions in the letter. It is believed that the letter was and still is in her possession.

Also, Tracy Baker testified to a long standing personal relationship with Lyle Menendez. Based on her testimony and the contents of the letter, it appears that she and the defendant Lyle Menendez were close friends who were involved in a correspondence during Lyle's incarceration. Based on the one letter which has come to the attention of authorities, it would appear that Lyle Menendez discussed in his correspondence with Tracy Baker matters which he desired her to testify to at his trial.

On March 18, 1994, your Affiant obtained a search warrant from Judge Pounders. Los Angeles Superior Court, to search the home of Tracy Baker. During the execution of that warrant your Affiant informed Tracy Baker that the primary object of the search warrant was any correspondence between her and Lyle Menendez and that if she had any such correspondence in her residence and would direct him to it, that would facilitate a speedy

execution of the warrant. Ms. Baker informed your Affiant at that time that such correspondence existed and that she had gathered all such correspondence together and turned it over to her attorney Paul L. Gabbert.

This morning in the Criminal Courts Building, Mr. Gabbert informed Deputy District Attorney David Conn that he has all the documents referred to in this warrant in his possession and on his person. He was in the company of Tracy Baker who is to appear before the Grand Jury at 10:00 a.m. this morning. Paul Gabbert had sought to challenge Baker's Grand Jury subpoena directing her to produce correspondence between her and Lyle Menendez before Judge James Bascue on March 18, 1994. Judge Bascue denied his motion without prejudice. Mr. Gabbert still objects to the production of the documents. It is the prosecutor's intention to seize the documents pursuant to this search warrant from Mr. Gabbert or from Tracy Baker if Mr. Gabbert returns the documents to her this morning before service of this warrant.

Thus it is believed that a search of the person of Paul Gabbert, his briefcase, and the person of Tracy Baker would reveal correspondence that would tend to prove that Ms. Baker presented perjured testimony and that Lyle Menendez encouraged Tracy Baker to testify falsely.

Your Affiant also will be in the presence of Elliott Oppenheim, Attorney at Law, who fulfills the requirements of Special Master as set out in Penal Code Section 1524(1). Your Affiant requests the appointment of Mr. Oppenheim as Special Master pursuant to this section to assist in the search of Mr. Gabbert's documents.

Attached hereto and made a part of this Affidavit are Attachment A (Transcript of Tracy Baker's trial testimony) and Attachment B (copy of three page letter to Ms. Baker.)

I have read the foregoing affidavit and I declare under penalty of perjury that it is true and correct.

Executed this 21st day of March, 1994 at Los Angeles, California.

/s/ Leslie Zoeller
LESLIE ZOELLER

SW No. 36450

**STATE OF CALIFORNIA - COUNTY OF
LOS ANGELES RETURN TO
SEARCH WARRANT**

Leslie Zoeller, #99980 being sworn, says that he/she (name of Affiant) conducted a search pursuant to the below described search warrant:

Issuing Magistrate: William Pounders

Magistrate's Court: Superior Court, Los Angeles
Judicial District

Date of Issuance: March 21, 1994

Date of Service: March 21, 1994

and searched the following:

1. The person of Paul L. Gabbert and any briefcases or packages on his person at the time of the search. Your affiant met Mr. Gabbert on March 17, 1994, is familiar with his appearance and will search Mr. Gabbert for the documaments [sic]/through Special Master Elliot Oppenheim.

2. The person of Tracy Baker. Your affiant knows Tracy Baker, is familiar with her appearance and will search Tracy Baker for the documaments [sic].

and seized the items*

described in the attached and incorporated inventory described below:

****No property seized**

I further swear that this is a true and detailed account of all the property taken by me pursuant to the search warrant, and that pursuant to Penal Code Sections 1528 and 1536 this property will be retained in my custody, subject to the order of this court in which the offense in respect to which the seized property is triable.

/s/ Leslie Zoeller
(Signature of Affiant)

Sworn to and subscribed before me this 24th day of March, 1994.

/s/ Wm. Pounders
(Signature of Magistrate
WILLIAM R. FOUNDERS
Judge of the Superior Court, Los Angeles,
Judicial District.

*List all items seized, including those not specifically listed on the warrant.

[]

EXHIBIT D

STATE OF CALIFORNIA -
COUNTY OF LOS ANGELESSEARCH WARRANT AND AFFIDAVIT
(AFFIDAVIT)

LESLIE ZOELLER, No. 99980 (Name of Affiant), being sworn, says that on the basis of the information contained within this Search Warrant and Affidavit and the attached and incorporated Statement of Probable Cause, he/she has probable cause to believe and does believe that the property described below is lawfully seizable pursuant to Penal Code Section 1524, as indicated below, and is now located at the locations set forth below. Wherefore, affiant requests that this Search Warrant be issued.

/s/ Leslie Zoeller (Signature of Affiant), NIGHT
SEARCH REQUESTED: YES [] NO []

(SEARCH WARRANT)

THE PEOPLE OF THE STATE OF CALIFORNIA TO ANY SHERIFF, POLICEMAN OR PEACE OFFICER IN THE COUNTY OF LOS ANGELES: proof by affidavit having been made before me by LESLIE ZOELLER, No. 99980 (Name of Affiant), that there is probable cause to believe that the property described herein may be found at the locations set forth herein and that it is seizable pursuant to Penal Code Section 1524 as indicated below by "X"(s) in that it:

_____ was stolen or embezzled
_____ was used as the means of committing a felony

_____ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he or she may have delivered it for the purpose of concealing it or preventing its discovery,

X tends to show that a felony has been committed or that a particular person has committed a felony,

_____ tends to show that sexual exploitation of a child, in violation of P.C. Section 311.3, has occurred or is occurring;

YOU ARE THEREFORE COMMANDED TO SEARCH:

1. The Law offices of Paul L. Gabbert, located at the Main Street Law Building, 2115 Main Street, Santa Monica, California; and any file cabinets, desks, computers and storage areas within that office. Mr. Gabbert's office is clearly identified as the Office of Paul Gabbert on the exterior of the office. Search to be made through Special Master *Elliott Oppenheim*.
/s/ WP

FOR THE FOLLOWING PROPERTY:

Any and all correspondence by and between Traci Baker and Lyle Menendez to each other.

AND TO SEIZE IT IF FOUND and bring it forthwith before me, or this court, at the courthouse of this court. This Search Warrant and incorporated Affidavit was sworn to and subscribed before me this 21st day of March, 1994, at 11:55 A.M. ~~P.M.~~, Wherefore, I find probable cause for the issuance of this Search Warrant and do issue it.

/s/ Wm R. Pounders (Signature of Magistrate),
WILLIAM R. POUNDERS

NIGHT SEARCH APPROVED: YES [] NO [✓] Judge of
the Superior/Municipal Court, Los Angeles Judicial
District

AFFIDAVIT

I, LESLIE ZOELLER, No. 99980, have been employed by the City of Beverly Hills Police Department as a police officer for 20 years 11 months. I have been a detective for 15 years 11 months, currently assigned to Robbery/Homicide Division. I am the Investigating Officer for the murders of Jose and Mary ("Kitty") Menendez which occurred on August 20, 1989 at 722 North Elm Drive, Beverly Hills, California.

Your affiant has interviewed in excess of 150 people in regard to the Menendez double homicide and has learned the following:

On August 20, 1989 your affiant responded to 722 North Elm Drive, Beverly Hills, and observed victims Jose and "Kitty" Menendez dead. Your affiant attended the autopsies of both decedents in which the cause of death for both was determined to be multiple shotgun blasts. Evidence observed by your affiant at the time of the crime leads to the conclusion that one or more 12 gauge shotguns were used, although no weapons have yet been recovered and no expended shells were recovered at the scene.

Sergeant Thomas Edmonds of the Beverly Hills Police Department interviewed the decedents' sons, Joseph (Lyle) and Erik Menendez, shortly after they called the police at 11:47 p.m. on August 20. Lyle and Erik indicated that on August 20, they returned home from the movies, they found their parents dead and immediately called the police.

Other evidence subsequently uncovered during the course of the investigation revealed that Erik and Lyle Menendez were involved in the murder of their parents.

Lyle Menendez was arrested for the murders of his parents on March 8, 1990. Erik Menendez surrendered to police and was arrested on March 11, 1990.

The defendants remained in custody up until they were indicted by the Los Angeles Grand Jury on December 7, 1992, an indictment which superseded the original complaint. They have also remained in custody since that time.

Trial on this matter began in June, 1993 and a mistrial was declared in January of 1994. During that trial both defendants admitted that they had killed their parents but claimed that they did so only after years of abuse from their parents. They are currently awaiting retrial for the murders.

Tracy L. Baker was called as a witness for the defense and testified before the jury on October 12, 1993. She said that she had known Lyle and Erik Menendez since October, 1988, spent time at their home during late 1988, and had dinner at their home on several occasions.

She recalled an occasion five years earlier in which she was about to have dinner with the family when something unusual occurred. She, Erik, Lyle, and Jose Menendez were together in the family dining room while Kitty Menendez was still bringing plates of food from the kitchen to the dining table.

She said that as Mrs. Menendez placed food on the table Mr. Menendez stood up and violently pushed his plate away from himself, knocking over all sorts of glasses and condiments. He said, "what did you do to this food?" He then told Erik and Lyle to go outside and wait because they were going to go out to eat.

Lyle motioned for Tracy to go with him. She grabbed her purse and coat and went outside to the front of the house. There they got in the car; Jose drove, Erik sat in front, she and Lyle sat in the back. Kitty did not come along. Erik asked his father, "Do you think she tried something on purpose?"

They went to the Hamburger Hamlet and had dinner. There was no discussion at the restaurant about the incident and she didn't ask about it. Mr. Menendez was not upset. She found him to be "charming" that evening.

This incident was used during closing argument by the defense. This incident provided the basis for the defense to argue that Kitty was trying to poison her family. It supported the contention of the defense that Kitty was an unstable woman and capable of killing or harming her family. It supported the contention of the defendants that they killed their parents out of fear for

their own safety and are therefore responsible for voluntary manslaughter, rather than the crime of murder as alleged by the prosecution.

After deliberations began in the Lyle Menendez jury trial, a letter was brought to the authorities attention, which, a handwriting expert says, was written by Lyle Menendez. Kurt Kuhn, a Beverly Hills Police Department civilian employee, who holds the title of Senior Identification Technician in charge of the Identification Bureau of the Beverly Hills Police Department, whose responsibilities includes supervising and performing expert handwriting analysis for the Beverly Hills Police Department, compared this letter with a letter written by Lyle Menendez to a friend, Donovan Goodreau. Lyle Menendez admitted during trial that he wrote the Goodreau letter. Kuhn says that the two letters were written by one and the same person.

This newly discovered letter was first mentioned to us by an individual named Dominic Dunne. During deliberations, Mr. Dunne spoke to Deputy District Attorney Pamela Bozanich about a conversation he had previously engaged in with a woman named Norma Novelli, concerning her relationship with the defendant Lyle Menendez. While discussing with Ms. Bozanich the conversation he had engaged in with Ms. Novelli, Mr. Dunne also told Ms. Bozanich about a copy of a 2 page letter he had received, purportedly written by the defendant Lyle Menendez to a woman named Tracy Baker. He had two pages of the letter.

Ms. Tracy Baker had previously testified in Mr. Menendez's trial on his behalf, and this letter appeared to be a script for her testimony.

Based on this conversation between Mr. Dunne and DDA Bozanich, your Affiant was left with the impression that the letter came to Mr. Dunne from Ms. Novelli. On February 24, 1994, your Affiant spoke with Ms. Novelli. She explained that her first contact with the defendant Lyle Menendez came when he wrote to her to discuss an article she had written which he apparently had read while incarcerated. From this letter she and he began a correspondence and by the summer of 1990 they were both writing each other and had exchanged phone numbers.

Your Affiant showed Ms. Novelli the two pages of the copy of the letter Mr. Dunne had spoken to Ms. Bozanich about and questioned her as to her knowledge concerning it. She said that her copy of the letter arrived in her post office box approximately 4 months ago. She said she immediately recognized the handwriting as belonging to Lyle Menendez. When asked if she had the letter, she said she still had the copy which had been sent to her. This copy included a missing third page. She gave your Affiant permission to take and copy the letter in its entirety. This copy was given to Kurt Kuhn and used for his comparison.

In this letter dated February 5, Lyle begins by telling Tracy that she should throw the letter away after she has absorbed the contents. He assures her that while what he is about to tell her may sound strange, it would be helpful to his case. He tells her that he feels she "can do

it" but that if she would rather not, she should just let him know. He then tells her that the "first incident" is as follows:

"You and I had spent the day together. Mrs. Menendez had cooked dinner and it was served in the dining room. Everyone was seated except Mrs. Menendez. She was still bringing this and that in from the kitchen. You were seated next to me with your back to the . . . seated at the head of the table to my left. Erik was seated across from us. Behind Mr. Menendez were the doors that open to the foyer. All the food was on the table. There was lots of it but you don't remember what the food was. Anyway all of a sudden Mr. Menendez said in a stern voice to Mrs. Menendez who was standing behind you, "What did you do to the food?!" There was a long silence or at least it seemed long and then Mr. Menendez shoved his plate forward, knocking over some stuff. He got up and said something like "go out and wait for me by the car boys, we're going out to eat." Then I got up immediately and said "come on Traci" and we both walked out into the foyer. Erik walked out too. You got your purse and jacket. We walked outside and stood in front of the big Mercedes. Erik and I were discussing something, whispering. You were just kind of standing there confused and embarrassed. Then Mr. Menendez came storming out of the house. He seemed upset. Either Erik or I, (you can't remember which) said to him "What's the matter Dad, you think she tried something?" As Mr. Menendez was getting into the front seat he said, "I don't know, but I don't trust her today." We all got in the car, you and I in the back seats and we drove

in silence listening to some radio station. We made a right coming out of our house but you're unsure the way we went after that. Anyway we ended up parking somewhere and eating at Hamburger Hamlet. It was a big one. We all ate dinner talking about various things. Mr. Menendez was charming. He paid the bill. We drove back home. You and I stayed out front and kissed for a long time. You didn't feel you should ask about what had happened earlier. You then left in your car. It wasn't that late. You never saw Mrs. Menendez. (It had just gotten dark when we left for Hamburger Hamlet.) You drove home still confused about what happened in the dining room although it seemed obvious Mr. Menendez thought Mrs. Menendez did something to the food. You were dying to ask me what it was all about but you just couldn't. Ok, that's the first incident. You really don't need to know anymore detail than I've provided here. It was a long time ago. It would be strange if you remembered things too well. However you do remember the statements I mentioned above very well - who said what to whom. You don't remember the unimportant conversations like what was said at Hamburger Hamlet etc. The best answer to any question you don't know the answer to is, "I don't remember." It's obvious why you remember certain things and certain statements. It was scary and confusing.

On Thursday, March 17, 1994, Tracy Baker was served with a subpoena to appear before the Los Angeles Grand Jury on Monday, March 21, 1994 at 8:30 a.m. That subpoena directed her to produce all correspondence received from the defendant Lyle Menendez. Ms. Baker

was served at the offices of her attorney, Paul L. Gabbert, located at 2115 Main Street in Santa Monica, California.

On Friday, March 18, 1994, Deputy District Attorney David Conn received a telephone call from Paul Gabbert. Mr. Gabbert informed DDA Conn that on Monday Tracy Baker would be asserting her Fifth Amendment privilege not to answer questions about the letter on the grounds that such answers may tend to incriminate her. He also requested that DDA Conn agree to delay her appearance before the Grand Jury so that he could have an opportunity to challenge that portion of the subpoena which directs her to produce correspondence received from Lyle Menendez. He explained that he believes such correspondence to be testimonial in nature and as such, it too would fall within the scope of her Fifth Amendment privilege. DDA Conn refused to postpone Tracy Baker's appearance before the Grand Jury or suspend her obligation to produce the requested documents.

The original letter has yet to be found. It was apparently written by Lyle Menendez to be received by Tracy Baker. The letter contained certain information and a request that this information be used by Tracy Baker during her testimony. It appears from her testimony that she followed the instructions in the letter. It is believed that the letter was and still is in her possession.

Also, Tracy Baker testified to a long standing personal relationship with Lyle Menendez. Based on her testimony and the contents of the letter, it appears that she and the defendant Lyle Menendez were close friends who were involved in a correspondence during Lyle's incarceration. Based on the one letter which has come to

the attention of authorities, it would appear that Lyle Menendez discussed in his correspondence with Tracy Baker matters which he desired her to testify to at his trial.

On March 18, 1994, your Affiant obtained a search warrant from Judge Pounders, Los Angeles Superior Court, to search the home of Tracy Baker. During the execution of that warrant your Affiant informed Tracy Baker that the primary object of the search warrant was any correspondence between her and Lyle Menendez and that if she had any such correspondence in her residence and would direct him to it, that would facilitate a speedy execution of the warrant. Ms. Baker informed your Affiant at that time that such correspondence existed and that she had gathered all such correspondence together and turned it over to her attorney Paul L. Gabbert.

This morning in the Criminal Courts Building, Mr. Gabbert informed Deputy District Attorney David Conn that he has all the documents referred to in this warrant in his possession and on his person. He was in the company of Tracy Baker who is to appear before the Grand Jury at 10:00 a.m. this morning. Paul Gabbert had sought to challenge Baker's Grand Jury subpoena directing her to produce correspondence between her and Lyle Menendez before Judge James Bascue on March 18, 1994. Judge Bascue denied his motion without prejudice. Mr. Gabbert still objects to the production of the documents. It is the prosecutor's intention to seize the documents pursuant to this search warrant from Mr. Gabbert or from Tracy Baker if Mr. Gabbert returns the documents to her this morning before service of this warrant.

On March 21, 1994, under the guidance of Special Master Elliott Oppenheim, a search of Paul Gabbert's person and briefcase, did not produce the documents. Your Affiant believes that a search of his offices will product the documents since he told Deputy Distirct Attorney David Conn he was in possession of such documents and Tracy Baker told your Affiant on Friday, March 18, 1994 that she turned the documents over to her attorney.

Thus it is believed that a search of Law Offices of Paul Gabbert reveal correspondence that would tend to prove that Ms. Baker presented perjured testimony and that Lyle Menendez encouraged Tracy Baker to testify falsely.

Your Affiant also will be in the presence of Elliott Oppenheim, Attorney at Law, who fulfills the requirements of Special Master as set out in Penal Code Section 1524(1). Your Affiant requests the appointment of Mr. Oppenheim as Special Master pursuant to this section to assist in the search of Mr. Gabbert's documents.

Attached hereto and made a part of this Affidavit are Attachment A (Transcript of Tracy Baker's trial testimony) and Attachment B (copy of three page letter to Ms. Baker.)

I have read the foregoing affidavit and I declare under penalty of perjury that it is true and correct.

Executed this 21st day of March, 1994 at Los Angeles, California.

/s/ Leslie Zoeller
LESLIE ZOELLER

SW No. 36451

STATE OF CALIFORNIA - COUNTY OF
LOS ANGELES RETURN TO
SEARCH WARRANT

Leslie Zoeller, #99980 being sworn, says that he/she
(name of Affiant)

conducted a search pursuant to the below described
search warrant:

Issuing Magistrate: William Pounders

Magistrate's Court: Superior Court, Los Angeles
Judicial District

Date of Issuance: March 21, 1994

Date of Service: March 21, 1994

and searched the following:

1. The Law offices of Paul L. Gabbert, located at the Main Street Law Building, 2115 Main Street, Santa Monica, California; and any file cabinets, desks, computers and storage areas within that office. Mr. Gabbert's office is clearly identified as the Office of Paul Gabbert on the exterior of the office. Search to be made through Special Master Elliott Oppenheim.

and seized the items*

XX described in the attached and incorporated inventory described below:

I further swear that this is a true and detailed account of all the property taken by me pursuant to the search warrant, and that pursuant to Penal Code Sections 1528 and 1536 this property will be retained in my custody, subject to the order of this court in which the offense in respect to which the seized property is triable.

/s/ Leslie Zoeller
(Signature of Affiant)

Sworn to and subscribed before me this 24th day of
March, 1994.

/s/ Wm. Founders
(Signature of Magistrate)
WILLIAM R. FOUNDERS
Judge of the Superior Court, Los Angeles,
Judicial District.

*List all items seized, including those not specifically
listed on the warrant.

POLICE DEPARTMENT

EVIDENCE AND PROPERTY RECORD

[LOGO]

Register
No. 37497

Date 3/21/94 Time 1600 Hours

CRIME TYPE 187 P.C.

Officer/I.D. No. L. Zoeller/99980

Officer/I.D. No. _____

Arrest Case # _____

Crime Case # 8907101

Other Case # _____

REFERENCE NAME(S):

Gabbert, Paul L. ☐ Arrestee
 ☐ Victim
 ☒ Other

CHECK FOR LATENT PRINTS:

ITEM NO.(S) _____

Property
Officer'sUse
OnlyITEM
NO.

DESCRIPTION

- 1 Handwritten letter of two pages to "Traci" from Lyle; dated "Jan 12 1993"
- 2 Five page handwritten letter to "Traci" from "Lyle"; dated "Jan 93"
- 3 Two page handwritten letter to "TB" from "Lyle"; dated "March 10 1993"
- 4 Three page handwritten letter to "TB" from "Lyle"; dated "March 93"
- 5 Four page handwritten letter to "TB" from "Lyle"; dated "March 93"
- 6 One page handwritten letter to "TB" from "Lyle"; dated "April 20, 93"
- 7 Two page handwritten letter to "TB" from "Lyle"; "April 24 93"
- 8 One page handwritten letter to "TB" from "Lyle"; dated "May 12, 93"
- 9 Four page handwritten letter to "TB" from "Lyle"; dated "Sunday May 30"
- 10 Two page handwritten letter to "TB" from "Lyle"; undated
- 11 Three page handwritten letter to "TB" from "Lyle"; dated "Friday night"

Temporary location of evidence:

Evidence locker # _____

Total Number Items 11THIS SECTION TO BE COMPLETED BY
PROPERTY OFFICER

Taken from temporary location & placed in evidence storage:

Date _____ Time _____

Location stored _____

By: _____

FINAL DISPOSITION OF EVIDENCE OR PROPERTY

RELEASED TO: ☐ Owner ☐ Other

Item No.(s) _____

RECEIVED BY: (Signature) _____

DATE/TIME _____

NAME: (Print) _____

RELEASED BY _____

ADDRESS: _____

AUTHORITY OF: _____

PHONE #: () _____

☐ Confiscated ☐ Destroyed☐ Auctioned

Date _____

Items _____

Authority of _____ Property Officer _____

DISPO REVIEW DATE _____

FINAL DISPOSITION STAMP

DE WITT W. CLINTON, County Counsel
 S. ROBERT AMBROSE, Assistant County Counsel
 DENNIS M. GONZALES, Principal Deputy County
 Counsel
 KEVIN C. BRAZILE, Principal Deputy County Counsel
 State Bar No. 113355
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 (213) 974-1943
 Attorneys for Defendant
 CONN and NAJERA

UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NO. CV 94-4227
Plaintiff,	)	ABC (EX)
vs.	)	NOTICE OF MOTION
	)	AND MOTION TO
DAVID CONN, CAROL	)	DISMISS;
NAJERA, ELLIOT	)	MEMORANDUM OF
OPPENHEIM, LESLIE	)	POINTS AND
ZOELLER and DOES 1	)	AUTHORITIES IN
through X.	)	SUPPORT OF MOTION
Defendants.	)	TO DISMISS [FRCP 12(B)]
	)	(Filed Aug. 5, 1994)
	)	DATE: AUGUST 29, 1994
	)	TIME: 10:00 A.M.
	)	COURTROOM: 690
)	Edward R. Royball Center
)	255 East Temple Street
)	Los Angeles, California
)	90012

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 CONN and NAJERA

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)	90012

TO PLAINTIFF AND YOUR ATTORNEY OF RECORD:

NOTICE IS HEREBY GIVEN that on August 29, 1994 at 10:00 a.m. before the Honorable A.B. Collins in Courtroom 690, located at 255 East Temple Street, Los Angeles, California, Defendants David Conn and Carol Najera, shall move pursuant to the provisions of Federal Rule of Civil Procedure 12(b), to Dismiss the First and Second causes of action (claims) of the complaint on each of the following grounds:

- 1) Defendants Conn and Najera are absolutely immune from Civil liability under the doctrine of prosecutorial immunity.
- 2) Defendants Conn and Najera are immune from civil liability under the doctrine of qualified immunity.
- 3) Defendants Conn and Najera are not liable because they did not personally participate in the search of plaintiff.

This motion shall be based upon this notice, the attached memorandum of points and authorities, pleadings, papers and files of this action and any other matter the court deems appropriate.

Dated: August 5, 1994

DE WITT W. CLINTON
County Counsel

By /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy
County Counsel

Attorneys for Defendants
CONN and NAJIRA [sic]

MEMORANDUM OF POINTS AND AUTHORITIES**I. STATEMENT OF FACTS**

According to the complaint, plaintiff Paul L. Gabbert, was and is an attorney who represented a witness, Tracy L. Baker, who was to testify in the highly publicized case of *People v. Eric and Lyle Menendez*. The complaint also alleges that Tracy Baker was under investigation by the Los Angeles County Grand Jury and the District Attorney's Office. The complaint further alleges that on March 21, 1994, plaintiff appeared with his client, Tracy Baker, at the Los Angeles County Criminal Courts Building so that Ms. Baker could give testimony before the Los Angeles County Grand Jury.

Shortly before Ms. Baker was to testify before the Grand Jury, plaintiff alleges that he was served with a search warrant for the persons of himself and Ms. Baker, plus the briefcase and packages he was carrying. According to the warrant, the search of plaintiff was to be conducted by "Special Master", Elliot Oppenheim.

In accordance with the warrant, plaintiff's person, briefcase and packages were searched by defendant Oppenheim in a separate and private room, and only Oppenheim and plaintiff were present during the first search. After plaintiff's files and briefcase were searched by defendant Oppenheim, defendant Leslie Zoeller, a detective with the Beverly Hills Police Department, searched plaintiff's files and briefcase again. According to the complaint defendants David Conn and Carol Najera observed the search conducted by Zoeller, and viewed the contents of plaintiff's files, but they did not direct, supervise or personally participate in either the

first nor second search. Furthermore, defendant Conn departed the room midway through the second search conducted by defendant Zoeller.

Plaintiff's complaint contends that defendants Conn and Najera, who are both deputy district attorneys (prosecutors) somehow violated his constitutional rights by having knowledge that a search warrant for plaintiff's briefcase and files was being obtained, and then observing a second search of plaintiff's briefcase and files that was conducted by a police detective pursuant to a facially valid warrant.

II. PROSECUTORS CONN AND NAJIRA [sic] ARE ABSOLUTELY IMMUNE FROM CIVIL RIGHTS LIABILITY.

In *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed 2d 123 (1976), the U.S. Supreme Court established the rule that prosecutors are entitled to absolute immunity from liability under the Civil Rights Act, 42 U.S.C. Section 1983, for any acts or omissions performed within the course and scope of their authority or closely associated with the criminal process. In *Imbler*, plaintiff, who was convicted of murder, brought a civil rights action under 42 U.S.C. Section 1983 against the prosecuting attorney on the grounds that the prosecutor knowingly used false testimony and suppressed material evidence in order to convict plaintiff of murder. The issue before the court in *Imbler* was whether a prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution could be held liable under Section 1983. The Court held that the prosecutor

was entitled to absolute immunity for both initiating and pursuing the criminal prosecution, by stating:

"We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force . . . We hold only that in initiating a prosecution and presenting the state's case, the prosecutor is immune from a civil suit for damages under §1983."

In *Burns v. Reed*, 500 U.S. ___, 111 S.Ct. 1934, 114 L.Ed. 2d 547 (1991), the court held that a prosecutor has absolute immunity from liability for damages under 42 U.S.C. Section 1983 for participating in a probable cause hearing.¹ In *Burns*, the prosecutor participated in a probable cause hearing where he examined a witness and successfully supported an application for a search warrant. The Supreme Court held that the foregoing activities of the prosecutor fell within the bounds of absolute prosecutorial immunity, by stating at page 1942 as follows:

"The prosecutor's actions at issue here - appearing before a judge and presenting evidence in support of a motion for a search warrant - clearly involve the prosecutor's role as advocate for the state, rather than his role as administrator or investigative officer . . . Moreover, since the issuance of a search warrant is unquestionably a judicial act, appearing

¹ The Court in *Burns v. Reed*, *Id.* held that prosecutors have only qualified immunity for giving legal advice.

at a probable cause hearing is intimately associated with the judicial phase of the criminal process . . . ' Accordingly, we hold that respondent's appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing are protected by absolute immunity."

In *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986), *en banc*, the Ninth Circuit adopted and followed the principles of prosecutorial immunity set forth in *Imbler v. Pachtman*, *supra*, stating:

"Prosecutors are also entitled to absolute immunity from section 1983 claims. Such immunity applies even if it leaves the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty.' " (Citations omitted)

Furthermore, the court in *Ashelman v. Pope*, *supra*, expressly *overruled* the case of *Beard v. Udall*, 648 F.2d 1264 (9th Cir. 1985), which stood for the proposition that a prosecutor may be found liable for filing charges he knows to be baseless, by declaring as follows at page 1078:

"Prosecutors are absolutely immune for quasi-judicial activities taken within the scope of their authority. To the extent that *Rankin and Beard* are to the contrary, they are overruled." (Emphasis added)

In the instant action, plaintiff's Section 1983 claim against prosecutors Conn and Najera is predicated on their participation in a Grand Jury hearing in which plaintiff's client, Tracy Baker was both a witness, as well

as a subject of the investigation. For example, the complaint alleges that the searches conducted by defendants Oppenheim and Zoeller, and only partially observed but not personally participated in by Conn or Najera, interfered with plaintiff's attorney client relationship with Ms. Baker and violated the Sixth Amendment. See paragraph 57(a) of the complaint. The complaint also alleges that the searches prevented plaintiff from protecting his client's fifth amendment right against self-incrimination. See paragraph 57(b) of the complaint. In addition, the complaint alleges that the searches violated the work-product and attorney-client privileges. See paragraph 57(f).

Plaintiff's Section 1983 claims against defendants Conn and Najera either arise from or are related to the Grand Jury Proceeding, which is a judicial proceeding where both Conn and Najera acted as advocates for the State of California. Hence, defendants Conn and Najera are entitled to absolute prosecutorial immunity because their *alleged* wrongful acts were intimately and closely associated with the criminal process.

Plaintiff cannot pierce the prosecutors absolute immunity shield for the reason that neither Conn nor Najera were involved in administrative or investigation activities. For example, the searches of plaintiff were conducted by defendants Oppenheim (Special Master) and Detective Zoeller. More importantly, Conn and Najera were not even present when Oppenheim searched plaintiff and they merely observed and did not personally participate in the search conducted by Zoeller.

Plaintiff does not contend that either Conn or Najera prepared the warrant application and there is no claim

that the prosecutors made any investigations in order to assist detective Zoeller in obtaining the search warrants. Moreover, there is no allegation that the prosecutors gave any legal advice to defendants Oppenheim or Zoeller.

Due to plaintiff's failure to allege that defendants Conn or Zoeller participated in some administrative or investigative activities that actually caused the searches of plaintiff, both Conn and Najera are entitled to absolute prosecutorial immunity.

III. DEFENDANTS CONN AND NAJIRA [sic] ARE ENTITLED TO QUALIFIED IMMUNITY.

Government officials performing discretionary functions enjoy qualified immunity from Section 1983 liability for actions performed in the course of their official duties, insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed. 2d 396 (1982); *Houghton v. South*, 965 F.2d 1532, 1534 (9th Cir. 1992). Thus, qualified immunity is a defense to lawsuits against governmental officials arising out of the performance of their duties, and its purpose is to permit such officials to conscientiously undertake their responsibilities without fear that they will be held liable in damages for actions that appear reasonable at the time, but are later held to violate statutory or constitutional rights. *See Kraus v. County of Pierce*, 793 F.2d 1108 (9th Cir. 1986); *See Also Hemphill v. Kincheloe*, 987 F.2d 589, 592-593 (9th Cir. 1993) (The qualified immunity doctrine gives ample room for mistaken judgments by protecting all but

the plainly incompetent or those who knowingly violate the law).

The test for qualified immunity is the objective legal reasonableness of an employees' acts. *See Davis v. Scherer*, 468 U.S. 183, 191, 104 S.Ct. 3012, 3018; 82 L.Ed. 2d 139 (1984); *Hemphill v. Kincheloe*, *supra* at page 593 (If a reasonable official could have believed that his actions were lawful, summary judgment on the basis of qualified immunity is appropriate). The question of the objective legal reasonableness of an officials' acts is one of law to be decided by the trial court, and not the jury. *See Hunter v. Bryant*, ___ U.S. ___, 112 S.Ct. 534, 536, 116 L.Ed. 2d 989 (1991); *Act Up Portland v. Bagley*, 988 F.2d 868, 872-873 (9th Cir. 1993); *Hemphill v. Kincheloe*, *supra* at page 592.

In *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991) the court explained the shifting burdens of proof that apply to the qualified immunity defense, by stating:

"The plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct . . . if plaintiff carries this burden, then the officer's must prove that their conduct was reasonable even though it might have violated constitutional standards. *See also Houghton v. South*, *Id.* 1534; *Baker v. Racansky*, 887 F.2d 183, 186 (9th Cir. 1989)."

In *Romero v. Kitsap County*, *supra* at page 627, the Ninth Circuit succinctly summarized the test for application of qualified immunity, by stating as follows:

"The qualified immunity test necessitates three inquiries: (1) the identification of the specific right allegedly violated; (2) the determination of whether that right was so "clearly established" as to alert a reasonable officer to its constitutional parameters; and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue." *See also Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988).

In the instant action, defendants Conn and Najera are entitled to qualified immunity because there is no clearly established law that a prosecutor who does not participate in a search made by a Special Master, pursuant to a facially valid warrant, has committed a constitutional violation. In addition, there is no clearly established law that a prosecutor commits a constitutional violation by observing a search conducted by a police officer pursuant to a facially valid warrant. Thus, unless plaintiff can cite or refer the court to some clearly established law that defendants Conn and Najera allegedly violated, then both prosecutors are entitled to qualified immunity.

Another reason that defendants Conn and Najera are immune from liability is because the two (2) searches made of plaintiff and his property were pursuant to facially valid warrants. The law is well established that government officials have qualified immunity for searches made pursuant to a facially valid warrant. *See Malley v. Briggs* 475 U.S. 335, 345, 106 S.Ct. 1092, 1098, 89 L.Ed.2d 271 (1986); *Anderson v. Creighton* 483 U.S. 635, 641, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Forster v. County of Santa Barbara* 896 F.2d 1146, 1147-1148 (9th Cir.

1990); *Morris v. County of Tehama* 795 F.2d 791, 795 (9th Cir. 1986).

Since there is no allegation in the complaint that the search warrants were invalid on their face, defendants Conn and Najera must be given qualified immunity.

IV. DEFENDANTS CONN AND NAJERA ARE NOT LIABLE BECAUSE THEY WERE NOT THE PROXIMATE CAUSE OF A CONSTITUTIONAL VIOLATION.

The doctrine of vicarious liability or respondeat superior liability is not applicable to claims brought under 42 U.S.C. Section 1983. *See Palmer v. Sanderson*, 9 F.3d 1433, 1438 (9th Cir. 1993); *Medrano v. City of Los Angeles*, 973 F.2d 1499, 1505 (9th Cir. 1993). Liability under Section 1983 arises only upon a showing of personal participation by the defendant. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1979). A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them. *See Taylor v. List, Id.* at page 1045; *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 680-681 (9th Cir. 1984).

A person subjects another to the deprivation of a constitutional right within the meaning of Section 1983, if he does an affirmative act, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made. *See Johnson v. Duffy* 588 F.2d 740, 743 (9th Cir. 1978); *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). Moreover, the causation requirement

of a Section 1983 action is not satisfied by a showing of mere causation in fact, but instead, the plaintiff must establish proximate or legal causation. *See Arnold v. IBM, supra* at page 1355.

In the present action, the prosecutors did not prepare the applications for the search warrants and they did not assist in the preparation of the warrant affidavit or application. Neither prosecutor personally participated in the two (2) searches and the prosecutors did not direct or supervise either search. Furthermore, the complaint fails to allege any wrongful acts by Conn or Najera that was a proximate cause of the warrants being obtained, and there are no allegations that Conn or Najera gave legal advice to either Oppenheim nor Zoeller.

In light of the inadequate allegations made against the prosecutors it is apparent that plaintiff does not have a cognizable claim against either prosecutor.

Dated: August 5, 1994

DE WITT W. CLINTON
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,)	
Plaintiff(s),	)	CASE NUMBER
vs.	)	CV 94-4227 ABC (Ex)
DAVID CONN, CAROL	)	PROOF OF SERVICE/
NAJERA, et al.,	)	ACKNOWLEDGMENT
Defendant(s).	)	OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years employed in the County of Los Angeles, State of California, and not a party to the above-entitled cause. On August 5, 1994, I served a true copy of:

**NOTICE OF MOTION AND MOTION TO DISMISS;
MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS [FRCP 12(B)]**

[] by personally delivering it to the person(s) indicated below in the manner as provided in FRCivP 5(b);

[X] by depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid to the following:

Michael J. Lightfoot
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Place of Mailing:

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500 W. Temple St.,
Los Angeles, CA 90012

Executed on August 5, 1994 at Los Angeles California.

I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

/s/ Barbara J. Holmes
Signature of person
making service

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,)	CASE NO.
Plaintiff,	)	CV 94-4227-RSWL(Ex)
vs.	)	PLAINTIFF GABBERT'S
	)	OPPOSITION TO
DAVID CONN, CAROL	)	DEFENDANTS' CONN
NAJERA, ELLIOT	)	AND NAJERA'S MOTION
OPPENHEIM, LESLIE	)	TO DISMISS PURSUANT
ZOELLER and DOES 1	)	TO FED.R.CIV.PROC.
through X.)	)	12(b)(6); MEMORANDUM
Defendants.	)	OF POINTS AND
	)	AUTHORITIES
	)	(Filed Aug. 26, 1994)
	)	Date: September 19, 1994
	)	Time: 10:00 a.m.
	)	Place: Courtroom 21
)	

Defendant Paul L. Gabbert hereby submits the following opposition to defendants Conn and Najera's Motion to Dismiss pursuant to Fed.R.Civ.Proc. 12(b)(6).

DATED: August 26, 1994

Respectfully submitted,
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United States v. Grandstaff 813 F.2d 1353 (9th Cir.), <i>cert. denied</i> , 484 U.S. 837 (1987)	24
United States v. Hammad 858 F.2d 834 (2d Cir.), <i>cert. denied</i> , 498 U.S. 871 (1990)	30
United States v. Irwin 612 F.2d 1182 (9th Cir. 1980)	29
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Vizbares v. Prieber 761 F.2d 1013 (4th Cir.), <i>cert. denied</i> , 474 U.S. 1101 (1986)	34
Ward v. County of San Diego 791 F.2d 1329 (9th Cir. 1986), <i>cert. denied</i> , 483 U.S. 1020 (1987)	20
White by Swafford v. Gerbitz 860 F.2d 661 (6th Cir.), <i>cert. denied</i> , 489 U.S. 1028 (1989)	15
Willock v. Dodenhoff 110 F.R.D. 656 (D.Conn.), <i>aff'd</i> , 805 F.2d 392 (2d Cir. 1986)	22
Williams-E v. Johnson 872 F.2d 224 (8th Cir.), <i>cert. denied</i> , 493 U.S. 871 (1989)	34
Wood v. Ostrander 879 F.2d 583 (9th Cir.), <i>cert. denied</i> , 498 U.S. 938 (1990)	19, 34
Wounded Knee Legal Defense/Offense Committee v. Federal Bureau of Investigation 507 F.2d 1281 (8th Cir. 1974)	28, 29

OTHER AUTHORITIES

2 W.R. La Fave, *Search & Seizure* (1987 ed.) 24, 25

§ 410(b)

§ 420(d)

I

INTRODUCTION

A. ALLEGATIONS IN THE COMPLAINT

This case involves the illegal search of an attorney which was conducted in the middle of a courthouse while the attorney was representing his client before the grand jury.

It is apparent from the defendants' moving papers that they have misapprehended both the thrust of the factual allegations set forth in plaintiff Gabbert's Complaint, as well as the relevant legal standards governing the factual analysis at issue. The defendants suggest that the pivotal issue presented by Mr. Gabbert's lawsuit is whether "A search made by a Special Master, pursuant to a facially valid warrant, [constitutes] a constitutional violation." *See Defendants' Motion to Dismiss at p. 10.* While, as phrased, this may be a correct statement of the law, it is of no moment in the present case.

The primary allegations contained in the Complaint are as follows:

1. That the search of Mr. Gabbert violated the Fourth Amendment in that:

- a) the warrant to search his person was obtained in violation of *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978);
 - b) the execution of the warrant was in violation of California Penal Code § 1524, which governs searches of attorneys and compels adherence to the statute's specific mandatory provisions; and
 - c) the execution of the warrant was impermissibly general and broad.
2. That the search of Mr. Gabbert's attorney-client files constitutes a substantive due process violation in that:
- a) the defendants' intrusion into Mr. Gabbert's relationship with his clients violated the sixth amendment and Penal Code § 1524;
 - b) the timing of the search was designed to prevent Mr. Gabbert from rendering effective assistance of counsel to his client in violation of the sixth amendment; and
 - c) the defendants knowingly contacted Mr. Gabbert's client in his absence, in violation of the sixth amendment and rules of professional conduct.

The defendants contend that they either did not cause the above-described violations, or are either absolutely or qualifiedly immune for such conduct. The defendants are wrong. As established below, the defendants were inextricably intertwined in all of the constitutional violations alleged. Furthermore, to the extent that the

California Penal Code Provision at issue here imposed mandatory duties on the defendants in conducting the searches of Mr. Gabbert, absolute immunity is unavailable to them. Finally, since the law governing the defendants' conduct was clearly established, and their violation of it was objectively unreasonable, qualified immunity is similarly unavailable to the defendants.

B. THE STANDARD GOVERNING A MOTION TO DISMISS

This case presents multiple factual issues. However, motions to dismiss pursuant to Fed.R.Civ.Proc. 12(b)(6) only permit a facial attack on the allegations contained in the complaint. Moreover, such motions are generally viewed with disfavor in federal courts. *De La Cruz v. Torme*, 582 F.2d 45, 48 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979).

The Supreme Court has concretely defined the standard to be applied in ruling on a motion to dismiss:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)(footnote omitted). Furthermore, "the allegations of the complaint should be construed favorably to the pleader." *Id.* The inquiry, then, is not whether a plaintiff's success on the merits is likely, but a far more

limited inquiry, whether the claimant is entitled to proceed beyond the threshold in attempting to establish his claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). As will be revealed, plaintiff has adequately plead each and every element of his claims for relief and the defendants' motion to dismiss should, accordingly, be denied.

II

STATEMENT OF FACTS

Plaintiff Paul L. Gabbert is an experienced criminal defense attorney who has practiced law in the Los Angeles area for almost twenty years. Complaint, ¶ 14. In February of 1994, Mr. Gabbert was hired to represent a young woman by the name of Tracy Baker, in connection with the Los Angeles County District Attorney's investigation of Ms. Baker regarding her testimony in the case of *People v. Lyle Menendez*. Complaint, ¶ 15. Defendants David Conn and Carol Najera, the deputy district attorneys investigating the matter, apparently believed Ms. Baker had perjured herself when testifying in the Menendez trial. Complaint, ¶ 16. In the course of their investigation, defendants Conn and Najera were seeking physical evidence, specifically a three page letter purportedly written by Lyle Menendez to Tracy Baker, to corroborate their suspicion that Ms. Baker had committed perjury. Complaint, ¶ 20. Defendant Conn advised Mr. Gabbert that Ms. Baker was a "target" of a grand jury investigation. Complaint, ¶ 17.

Mr. Gabbert agreed, at defendant Conn's request, to make Ms. Baker available to testify before the grand jury.

Id. Defendant Leslie Zoeller, a detective with the Beverly Hills Police Department, was to serve the subpoena. *Id.* Prior to serving the subpoena, but knowing Ms. Baker was represented by Mr. Gabbert, defendant Zoeller appeared at Ms. Baker's home and attempted to question her regarding the existence of the letter purportedly written by Mr. Menendez to Ms. Baker. Complaint, ¶ 18.

On Thursday, March 17, 1994, defendant Zoeller served Mr. Gabbert with a subpoena directing Ms. Baker to appear before the grand jury on Monday March 21, 1994. Complaint, ¶¶ 19-20. The subpoena sought correspondence between Mr. Menendez and Ms. Baker. Complaint, ¶ 20 and Exhibit A. Because Mr. Gabbert recognized that the request for the production of documents potentially implicated Ms. Baker's fifth amendment right against compulsory self-incrimination, Mr. Gabbert prepared a motion to quash the subpoena. Complaint, ¶ 20. Defendant Conn refused Mr. Gabbert's request that Ms. Baker's grand jury appearance be continued for one week in order to allow the appropriate litigation of the constitutional issues presented in the motion to quash. Complaint ¶ 21. On Friday afternoon, March 18, Mr. Gabbert's *ex parte* motion for an order shortening the time within the motion to quash could be heard was denied. Complaint, ¶ 23.

On Friday evening, defendants Conn, Najera, and Zoeller appeared at Ms. Baker's home with a search warrant for the same documents sought by the grand jury subpoena. Complaint, ¶ 24. When the search of Ms. Baker's home failed to reveal the wanted evidence they sought, the defendants embarked on the course of illegal conduct which forms the basis of this lawsuit.

On Monday morning, just before Ms. Baker was to appear before the grand jury, defendant Conn falsely represented to Mr. Gabbert that he was preparing a proposed immunity agreement for Ms. Baker to review. Complaint, ¶¶ 30-33. What the defendants were actually doing was obtaining a search warrant for Mr. Gabbert. Complaint, Exhibit C at p. 54-55. The warrant affidavit contained misstatements regarding an exchange Mr. Gabbert had with defendant Conn as to what documents Mr. Gabbert then had in his possession. Shortly thereafter, armed with an illegally obtained warrant, the defendants repeatedly, searched Mr. Gabbert's belongings, including his attorney-client privileged files. Complaint, ¶ 29 and Exhibit C at pp. 54-55.

At the direction of defendants Conn, Najera and Zoeller, defendant Elliot Oppenheim was appointed as a special master to conduct the search of Mr. Gabbert, pursuant to California Penal Code § 1524. Defendant Oppenheim initiated the search of Mr. Gabbert. Defendants Conn, Najera and Zoeller participated in a second search of Mr. Gabbert's privileged files. Complaint, ¶¶ 8, 34-36. Penal Code § 1524 contains comprehensive statutory mandates designed to protect against the disclosure of privileged attorney-client materials. Complaint, ¶ 35. The searches conducted by the defendants violated substantially all of section 1524's provisions. Complaint, ¶¶ 35-46.

Furthermore, the timing of the searches was carefully and strategically orchestrated by the defendants to coincide with Ms. Baker's appearance before the grand jury. Thus, although Ms. Baker attempted to seek her attorney's counsel during the course of her testimony, she was

prevented from doing so because Mr. Gabbert was being illegally detained and searched in a separate room. Complaint, ¶¶ 37, 43.

As clearly demonstrated below, the defendants' conduct was in obvious derogation of Mr. Gabbert's – and Ms. Baker's – constitutional rights.

III

ARGUMENT

A. THE CONDUCT OF DEFENDANTS CONN AND NAJERA WAS THE PROXIMATE CAUSE OF THE CONSTITUTIONAL VIOLATIONS SUFFERED BY MR. GABBERT

Defendants contend that they cannot be held liable for the civil rights violations alleged by Mr. Gabbert because they did not personally participate in the acts which caused them. Defendants' contention flies in the face of logic and binding Ninth Circuit precedent, as even the cases cited by the defendants reveal.

Plaintiff readily concedes that *respondeat superior* liability is not available under section 1983. However, "personal participation is not the only predicate for section 1983 liability." *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978); *Arnold v. International Business Machines Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981). To the contrary,

[t]he requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know

would cause others to inflict the constitutional injury.

Id. Thus, a prosecutor who directs illegal activity is liable under section 1983 even if he did not personally perform the illegal acts. *In re Scott County Master Docket*, 618 F.Supp. 1534, 1554 (D.Minn. 1985), *rev'd sub. nom. in part on other grounds, Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), *cert. denied*, 484 U.S. 828 (1987); *citing Robichaud v. Ronan*, 351 F.2d 533, 537 (9th Cir. 1965). It defies credulity for the defendants to suggest that they were not participants in the conduct alleged here. In reality, defendants Conn and Najera were intimately involved with and, in fact, planned and directed each stage of the events which resulted in the constitutional violations suffered by Mr. Gabbert and Ms. Baker.

It is apparent the defendants were personally involved in the initial stages of the investigation. Defendant Conn supplied defendant Zoeller with the basis for the probable cause necessary to obtain a search warrant for Ms. Baker's home. Complaint, Exhibit B at p. 38. Defendants Conn and Najera participated in the search of Ms. Baker's home. Complaint, ¶¶ 24-26. Moreover, defendants Conn and Najera attempted to question Ms. Baker during the search, despite knowing that she was represented by an attorney who could not be reached. Complaint, ¶ 26. Indeed, defendant Conn asked Ms. Baker several questions about her relationship with her attorney. *id.*

Defendants Conn and Najera's personal involvement in the investigation escalated as the illegal course of conduct began in earnest. As detailed in the Complaint,

on the morning of Ms. Baker's scheduled grand jury appearance, defendants Conn and Najera approached Mr. Gabbert and Ms. Baker while they were waiting in the grand jury anteroom. Mr. Gabbert told defendants that he had with him the motion to quash the grand jury subpoena he attempted to file the previous Friday. Complaint, ¶¶ 28-29. Defendant Conn discussed a possible grant of immunity for Ms. Baker and agreed to have a draft letter of immunity prepared while Mr. Gabbert waited. Complaint, ¶ 30-31. The immunity discussion was a purposefully orchestrated ruse devised by the defendants in order to stall for time while they had defendant Zoeller apply for a search warrant for Mr. Gabbert. Complaint, ¶ 34 and Exhibit C at p. 54.

The defendants caused defendant Oppenheim to be appointed as a special master, pursuant to Penal Code § 1524, to search Mr. Gabbert's belongings. Complaint, ¶ 34. Oppenheim, an agent of defendants Conn and Najera, initiated the search of Mr. Gabbert. Complaint, ¶¶ 8, 42. Over plaintiff's repeated objections, defendant Oppenheim searched Mr. Gabbert's attorney-client privileged files. Complaint, ¶ 42. Almost simultaneous with the commencement of the search, defendant Conn began his questioning of Ms. Baker before the grand jury, knowing her attorney would be unavailable to her. Complaint, ¶ 37. Defendants Conn and Najera intentionally separated Ms. Baker from her lawyer so that Ms. Baker would be unable to consult with Mr. Gabbert as to whether she should assert her fifth amendment privilege against self incrimination in response to questions from the grand jury. Complaint, ¶¶ 37, 43.

Midway through Ms. Baker's testimony, defendant Conn left the grand jury room and told Mr. Gabbert that defendant Zoeller was going to conduct an additional search of Mr. Gabbert, because he was advised by defendant Oppenheim that nothing contained in Mr. Gabbert's files was privileged. Complaint, ¶ 44. Defendant Conn denied Mr. Gabbert's request that the second search be delayed until Mr. Gabbert's attorneys could be present. *Id.* The second search was entirely gratuitous since Mr. Gabbert had already given defendant Oppenheim the only document in his possession within the scope of the warrant. Complaint, ¶ 40. Defendants Conn and Najera participated in the second search and viewed the contents of Mr. Gabbert's privileged correspondence file relating to Ms. Baker. Complaint, ¶ 45.

In the face of these allegations, the defendants' contention that they did not participate in the conduct forming the basis of this lawsuit is unsupportable. Not only did they personally participate in a substantial portion of the conduct alleged, but at all times they were also directing the activities of defendants Zoeller and Oppenheim. It is an absolute distortion of the realities of law enforcement procedure to suggest that defendants Zoeller and Oppenheim acted on their own initiative in this matter. Defendants Conn and Najera, the supervising district attorneys in the case, strategically planned and executed the investigation at every turn and, thus, fully participated in the conduct which resulted in the constitutional deprivations at issue.

B. PROSECUTORS MAY NOT RELY ON ABSOLUTE IMMUNITY WHERE, AS HERE, THEY WERE ENGAGED IN INVESTIGATORY CONDUCT

By its very terms, Section 1983 admits of no immunities. Instead, it imposes liability upon "every person" who under color of state law, deprives another of his civil rights. "[C]ourts are naturally loathe to clothe any person with immunity which would frustrate the statute's design of providing vindication to those wronged by the misuse of state power." *Marrero v. City of Hialeah*, 625 F.2d 499, 503 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981); *citing Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 1415, 63 L.Ed.2d 673 (1980). The "presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 1939, 114 L.Ed.2d 547 (1991). As the Supreme Court reaffirmed in *Burns*:

We have been 'quite sparing' in our recognition of absolute immunity, [] and have refused to extend it any 'further than its justification would warrant.'

111 S.Ct. at 1939 (citations omitted); *accord Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S.Ct. 2606, 2613, 125 L.Ed.2d 209 (1993); *Houston v. Partee*, 978 F.2d 362, 365 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1647 (1993) (absolute immunity of 'rare and exceptional character') (citation omitted). The official seeking immunity bears the burden of demonstrating that such immunity is justified. *Burns v. Reed*, 111 S.Ct. at 1939.

In determining whether the particular actions of governmental officials will be accorded absolute or qualified immunity, the Supreme Court has applied a "functional approach." *Burns*, 111 S.Ct. at 1939. This approach looks to "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S. 219, 229, 108 S.Ct. 538, 545, 98 L.Ed.2d 555 (1988). Thus, the actions of the defendants here are not absolutely immune "merely because they [were] performed by prosecutors." *Buckley*, 113 S.Ct. at 2615. Prosecutors will be granted absolute immunity only where their "activities [are] intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S.Ct. 984, 994, 47 L.Ed.2d 128 (1976). Prosecutors do not receive absolute immunity for those acts performed in their investigative capacity. *Buckley*, 113 S.Ct. at 2626. The courts have observed that,

a prosecutor who assists, directs, or otherwise participates . . . in obtaining evidence prior to an indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacities of deciding which suits to bring and conducting them in court.

Marrero, supra, 625 F.2d at 499; *Joseph v. Patterson*, 795 F.2d 549, 556 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987).

The defendants' conduct here falls squarely within the ambit of their roles as investigators, rather than advocates.¹ The single purpose of the defendants' conduct was

¹ Defendants' reliance on *Burns v. Reed* to support their assertion that they were acting as advocates is entirely misplaced. In *Burns* the prosecutor, not the police officer,

to gather evidence as to Tracy Baker. Indeed, the Complaint is rife with allegations of the defendants' investigatory conduct. For example, defendant Conn advised Mr. Gabbert that Ms. Baker was a target of a grand jury investigation. Complaint, ¶ 17. After Mr. Gabbert moved to quash the subpoena, defendants Conn and Najera executed the search warrant at Ms. Baker's house seeking evidence which would tend to inculcate her in a charge of perjury. Complaint, ¶¶ 16-24. When the defendants did not obtain the evidence they sought at Ms. Baker's home, defendants had a search warrant issued for Mr. Gabbert and Ms. Baker. Complaint, ¶¶ 29-34 and Exhibit C. The affidavit for this warrant contains information supplied by defendant Conn to defendant Zoeller. *Id.* Defendants Conn and Najera participated in the search of Mr. Gabbert, seeking evidence against Ms. Baker. Complaint, ¶¶ 44-45. As the above events reveal, the defendants were continuously engaged in obtaining evidence to use against Ms. Baker. This is quintessential investigative conduct.

As the Supreme Court has held, when prosecutors do not have probable cause to arrest a suspect, in this case Ms. Baker, their conduct in evidence-gathering is deemed

appeared before the judge and examined witnesses in order to obtain a search warrant. Indeed, under that jurisdiction's rule, the prosecutor was required to participate in a probable cause hearing to obtain a warrant. It is not disputed that, as the *Burns* Court held, the prosecutors' "appearance in court" and "presentation of evidence at that hearing" would be absolutely immune. 111 S.Ct. at 1942. No such equivalent conduct occurred in the case before this Court.

purely investigatory. *Buckley*, 113 S.Ct. at 2606. In language particularly apt here, the Court in *Buckley* noted that:

There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'

113 S.Ct. at 2616. Of equal importance, "a prosecutor who directs illegal investigatory activities is not cloaked by absolute immunity even if the prosecutor did not personally perform the proper acts." *In re Scott County Master Docket*, *supra*, 618 F.Supp. at 1554; *accord*, *Robichaud v. Ronan*, 351 F.2d 533, 537 (9th Cir. 1965). Similarly, prosecutors are not absolutely immune for the advice they give to law enforcement authorities. *Burns v. Reed*, 111 S.Ct. at 1943-44. Thus, the Supreme Court has recognized, "it would be incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but allow police officers only qualified immunity for following the advice." *Id.* at 1944. The defendants can take no refuge in the fact that defendants Zoeller and Oppenheim performed certain of the acts alleged, when it was the prosecutors who orchestrated the investigation of Tracy Baker and provided advice to defendants Zoeller and Oppenheim as to how to assist in the execution of

that investigation. Defendants Conn and Najera acted as investigators with respect to the section 1983 violations alleged and are not entitled to absolute immunity for those acts.

C. DEFENDANTS CONN AND NAJERA ARE NOT ENTITLED TO QUALIFIED IMMUNITY AS TO MINISTERIAL ACTS

In certain circumstances, government employees may be entitled to qualified immunity for violating an individual's constitutional rights during the performance of their official duties. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). However, it is axiomatic that a defendant will only be shielded from liability in connection with acts undertaken in the performance of discretionary as opposed to ministerial duties. *See Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738; *Anderson v. Creighton*, 483 U.S. 635, 637-38, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987); *Davis v. Holly*, 835 F.2d 1175, 1178 (6th Cir. 1987); *People of Three Mile Island v. Nuclear Regulatory Commissioners*, 747 F.2d 139, 143 (3d Cir. 1984). *See also White By Swafford v. Gerbitz*, 860 F.2d 661, 665 n.4 (6th Cir. 1988), *cert. denied*, 489 U.S. 1028 (1989) (where defendant failed timely to release plaintiff from custody, pursuant to court order, qualified immunity defense not available). As the Third Circuit has stated:

'Discretionary-decisional' acts are those which involve significant decision-making that entails personal deliberation, decision and judgment. 'Ministerial-operational' acts involve the execution or implementation of a decision and entail only minor decision-making.

Davis v. Holly, 835 F.2d at 1178 (citations omitted).

In the present case, the defendants are liable for failing to insure that the statutory mandates of California Penal Code § 1524² were followed at the time Mr. Gabbert's privileged attorney-client files were searched. Section 1524 provides a comprehensive statutory scheme which was designed to prevent against precisely the type of unfettered, exploratory search of an attorney's files which took place in the present case. Section 1524(c)(2) requires that if an attorney served with a warrant states that an "item or items should not be disclosed, they *shall* be sealed by the special master and taken to court for a hearing." Section 1524(e) further provides that a special master may permit the party serving the warrant to accompany the special master as he or she conducts the search. However, that party "*shall* not participate in the search nor *shall* he or she examine any of the items being searched by the special master except upon agreement of the party upon whom the warrant has been served." Cal. Penal Code § 1524 (emphasis added); Complaint, ¶ 35. In *Geilim v. Superior Court*, 234 Cal.App.3d 166, 285 Cal.Rptr. 602 (1991), the leading case analyzing section 1524, the court made clear that the statute's dictates are mandatory.

² It is well-established that state statutes may form the basis of a section 1983 action where the violation of state law causes the deprivation of rights protected by the constitution. *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1482 n.22 (9th Cir.), cert. denied, 114 S.Ct. 549 (1993); *Draper v. Coombs*, 792 F.2d 915, 921 (9th Cir. 1986); *Long v. Norris*, 929 F.2d 1111, 1115 (6th Cir.), cert. denied, 112 S.Ct. 187 (1991). See also *Davis v. Scherer*, 468 U.S. 183, 194 n.12, 104 S.Ct. 3012, 82 L.Ed 2d. 139, reh. denied, 468 U.S. 1226 (1984).

As the court noted, its provisions are phrased as "requirements" and the procedures specified "must be followed." 234 Cal.App.3d at 172-73, 285 Cal.Rptr. at 605-607.

The defendants failed to comply with section 1524 and their failure to do so resulted in a violation of Mr. Gabbert's (and his client's) constitutional rights. Mr. Gabbert repeatedly advised the special master conducting the search, defendant Elliot Oppenheim, that his briefcase contained attorney-client and work-product privileged documents. Defendant Oppenheim was required to cease the search and have those documents sealed pursuant to section 1524 in order to prevent the disclosure of privileged information. He failed to do so. Complaint, ¶¶ 35-39. Indeed, although Mr. Gabbert voluntarily gave defendant Oppenheim the only document in his possession responsive to the search warrant, defendant Oppenheim nonetheless continued to search through Mr. Gabbert's attorney-client correspondence files. Most egregiously, defendant Oppenheim read the entire file relating to Tracy Baker. Complaint ¶¶ 40-41.

Moreover, after unilaterally and erroneously deciding, based solely upon defendant Oppenheim's representations that none of the materials in Mr. Gabbert's files contained privileged materials, defendant Conn permitted defendant Zoeller to conduct yet another search of Mr. Gabbert's files in direct and obvious contravention of section 1524. Complaint ¶ 44. Despite Mr. Gabbert's objections, defendants Conn and Najera participated in the second search and also viewed the contents of the Baker file. Complaint, ¶ 45. Section 1524 explicitly prohibits anyone but the special master from conducting a

search unless the person being searched gives their consent. Not only did Mr. Gabbert not consent, he repeatedly objected to the defendants' conduct.

Defendants Conn and Najera's repeated intentional violations of section 1524 resulted in a substantial deprivation of Mr. Gabbert's constitutional rights. First, the defendants' conduct denied Mr. Gabbert his right to be free from unreasonable searches and seizures. Second, the statutory breaches committed by the defendants resulted in a violation of plaintiff's substantive due process rights. That is, the defendants' conduct, in directing, permitting and/or participating in the illegal search of Mr. Gabbert's files, prevented him from effectively representing his clients, most specifically Ms. Baker, who was compelled to testify before the grand jury while her lawyer was being searched in the courthouse hallway. The defendants conduct was in plain derogation of the rights and obligations accorded to Mr. Gabbert, under the fourth, fifth, sixth and fourteenth amendments. Complaint, ¶ 57.

As *Geilim* and the statutory language itself reveal, the defendants here were permitted no discretion in determining whether or how to "execute" or "implement" section 1524 – they were simply required to adhere to its provisions. Accordingly, the defendants may not now cloak themselves with a blanket assertion of qualified immunity with respect to their violations of the statute's provisions.

D. THE CONSTITUTIONAL RIGHTS AT ISSUE WERE CLEARLY ESTABLISHED AT THE TIME OF THE ALLEGED CONDUCT AND THEIR VIOLATION WAS OBJECTIVELY UNREASONABLE

Assuming qualified immunity is available as a potential defense for the defendants' non-ministerial conduct, the following two-part analysis is to be applied: "(1) Was the law governing the official's conduct clearly established? (2) Under that law, could a reasonable officer have believed the conduct was lawful?" *Hallstrom, supra*, 991 F.2d at 1482, quoting *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871-72 (9th Cir. 1993). The first inquiry, whether the law is clearly established, "is a pure question of law for the court to decide." *Mendoza v. Block*, 94 Daily Journal D.A.R. 5022, 5024, F.3d (9th Cir. 1994). Contrary to the defendants' assertions, however, judicial determination with respect to the second inquiry is not automatic. The factual issues necessarily involved in the reasonableness inquiry cannot be resolved in the context of the motion before the Court.³

For qualified immunity purposes, the Supreme Court has held that "the contours of the right at issue must be

³ Where, as here, material issues of fact are in dispute, such as to "the facts and circumstances within an [official's] knowledge" or "what the [official] and claimant did or failed to do," the case must proceed to a jury. *Act Up!*, 988 F.2d at 873; *Sloman v. Tadlock*, 21 F.3d 1462, 1467 (9th Cir. 1994). As the Ninth Circuit stated in *Sloman*, "evaluating the reasonableness of human conduct is undeniably within the area of jury competence." "[T]he jury is best suited to determine the reasonableness of an officer's conduct in light of the factual context in which it takes place." 21 F.3d 1468.

sufficiently clear that . . . a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). This standard "does not mean that any official action is protected by qualified immunity, 'unless the very action in question has previously been held unlawful. . . .'" *Mendoza v. Block*, *supra*, 94 Daily Journal D.A.R. at 5024, quoting *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039. As the *Mendoza* court recognized, an official is "not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." 94 Daily Journal D.A.R. at 5024. The Ninth Circuit has further held that, in the absence of clear precedent, this Court "should look to whatever decisional law is available to ascertain whether the law is clearly established. . . ." *Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990). Such "available law" includes state court decisions, as well as cases from other federal circuits and districts. *Id.*; *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987).

Substantially all of the circuits acknowledge that, insofar as section 1983 "may offer the only realistic avenue for vindication of constitutional guarantees," *Harlow*, *supra*, 457 U.S. at 814, 102 S.Ct. at 2736, "insisting on precise factual correspondence between the conduct at issue and reported case law is tantamount to permitting officials one liability-free violation of a constitutional or statutory right." *People of Three Mile Island v. Nuclear Regulatory Commissioners*, *supra*, 747 F.2d at 145. Thus, many courts have required that officials know and apply

general legal principles. *Id.* at 144 ("requiring officials to consider the legal implications of their actions should have a salutary effect"). See also, *Little v. Walker*, 552 F.2d 193, 197 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978) (official may not take solace in ostrichism; asserted ignorance cannot provide a doctrinal safe harbor) and *Melton v. City of Oklahoma City*, 879 F.2d 706, 729 & n.37 (10th Cir. 1989), *cert. denied*, 112 S.Ct. 296 (1991) (*Harlow* qualified immunity standard cannot become an insuperable barrier; structuring clearly established inquiry too narrowly would render officials immune in all but the rarest cases).

1. The First Claim For Relief – Fourth Amendment Violations

Plaintiff's first claim is grounded in the fourth amendment's proscription against unreasonable searches and seizures. This claim has three components: 1) the warrant was obtained in violation of *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); 2) the warrant's execution was impermissibly broad and general, and 3) the defendants violated Penal Code § 1524 when Mr. Gabbert was searched.⁴ Complaint, ¶ 50. Mr. Gabbert's constitutional rights with respect to each of these components were clearly established at the time of the searches at issue.

⁴ The Penal Code § 1524 violations are discussed at length in Section III C, above. Plaintiff will not repeat those arguments again here, but instead incorporates them by reference.

a. The Warrant Affidavit Contained Material Misstatements of Fact

For almost 20 years, it has been bedrock constitutional law that the fourth amendment "requires [that a warrant affidavit contain] a truthful factual showing sufficient to constitute probable cause." *Olson v. Tyler*, 771 F.2d 277, 281 (7th Cir. 1985). Thus, pursuant to the Supreme Court's holding in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978),

If an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements, not only is his conduct the active cause of the illegal [search] but he cannot be said to have acted in an objectively reasonable manner.

Olson, 771 F.2d at 281. (footnotes omitted). It is similarly well established that the *Franks* rule is to be applied with equal force in section 1983 cases and criminal suppression hearings. *Id.*; *Branch v. Tunnell*, 14 F.3d 449, 452 (9th Cir.), *cert. denied*, 114 S.Ct. 2704 (1994); (*Bivens* action); *Golino v. City of New Haven*, 761 F.Supp. 962, 968 (D.Conn.), *aff'd.*, 950 F.2d 864 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 3032 (1992); *Willocks v. Dodenhoff*, 110 F.R.D. 656, 659 (D.Conn.), *aff'd.*, 805 F.2d 392 (2d Cir. 1986) ("constitutional rights should be applied congruently in criminal suppression hearings and section 1983 damage actions"); *Ogden v. District of Columbia*, 676 F.Supp. 324, 326 (D.D.C. 1987), *aff'd.*, 861 F.2d 303 (D.C. Cir. 1988).

In the present case, the warrant affidavit contains two material misstatements of fact without which the search warrant for Mr. Gabbert and his belongings could not have issued. To begin with, the warrant affidavit claims that:

This morning [March 18, 1994] in the Criminal Courts Building, Mr. Gabbert informed Deputy District Attorney David Conn that he has all the documents referred to in this warrant in his possession and on his person.

Complaint, Exhibit C at p. 54.⁵ The affidavit further claimed that Judge Bascue had previously denied Mr. Gabbert's motion to quash the subpoena which sought the identical documents as the search warrant. *Id.* at p. 55. Both of these statements were false and defendants Conn and Najera knew they were false.⁶

Mr. Gabbert never advised defendant Conn that he had the documents sought by the grand jury subpoena and search warrant "in his possession and on his person." What he did tell defendant Conn on the morning of March 18th was that he had with him the papers relating to the motion to quash the grand jury subpoena. Complaint, ¶ 29. Furthermore, Judge Bascue did not deny Mr.

⁵ Material such as the subpoenas and search warrants attached as exhibits to plaintiff's complaint may properly be considered on a motion to dismiss. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994).

⁶ As discussed in Section III A, *supra*, it is apparent from the language of the affidavit itself that defendants Conn and Najera directed, supervised and/or participated in the preparation of the warrant affidavit and are therefore responsible for the misstatements contained therein.

Gabbert's motion to quash; he only denied the *ex parte* application for an order shortening the time within which the motion to quash could be heard. *Id.* In fact, Mr. Gabbert specifically showed both defendants Conn and Najera Judge Bascue's order to this effect. *Id.* Disregarding the truth, defendants Conn and Najera supplied false information to defendant Zoeller in order to obtain a warrant to search Mr. Gabbert. Without these two critical factual elements, a magistrate would have no basis to believe the documents sought by the warrant would be found on Mr. Gabbert's person or in his briefcase, and would not have issued a warrant.⁷

b. Assuming, Arguendo, That The Warrant Affidavit Was Valid, The Execution Of The Warrant Was Impermissibly General And Broad

If a warrant sufficiently describes the area to be searched, it may justify a search of the personal effects

⁷ Even assuming a heightened pleading standard exists for *Franks* violations in civil rights cases, see *Branch v. Tunnell*, 14 F.3d at 452, plaintiff has met that standard here. That is he has alleged (1) the portion of the warrant claimed to be false, (2) facts tending to show the defendants were aware of the falsity, and (3) that the false statements were necessary to a finding of probable cause. *Id.*; Complaint, ¶¶ 29, 50, 51. It is worth noting that in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, ___ U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), the Supreme Court specifically held that a heightened pleading standard more stringent than the requirements of Fed.R.Civ.Proc. 8(a) could not be applied in civil rights cases alleging municipal liability. The Court did not consider the permissibility of heightened pleading requirements in cases involving individual government officials because that issue was not before the Court.

located within that area. It is, however, indisputable that in order to search such personal effects, they must be legitimately capable of containing the items described in the warrant. *United States v. Disla*, 805 F.2d 1340, 1346 (9th Cir. 1986); see also *United States v. Gomez-Soto*, 723 F.2d 649, 654 (9th Cir.), *cert. denied*, 466 U.S. 977 (1984); *United States v. Grandstaff*, 813 F.2d 1353, 1358 (9th Cir.), *cert. denied*, 484 U.S. 837 (1987); 2 W.R. LaFave, *Search & Seizure* § 410(b) & (d) at pp. 317 & 324-25 (1987 ed.). In other words, one cannot search for an elephant in a match box.

In the present case, the warrant authorized a search for correspondence between Tracy Baker and Lyle Mendez. In purported reliance on the warrant, two searches of Mr. Gabbert were conducted. The first search, conducted by defendant Oppenheim, as directed by defendants Conn and Najera, was of Mr. Gabbert's files, briefcase and the contents contained therein. The second search, conducted by all of the defendants, was of Mr. Gabbert's attorney-client files.

Even assuming the first search of Mr. Gabbert's files was in compliance with section 1524, the defendants were not entitled to search through many of the other items contained in his briefcase which could not have contained the correspondence sought. In particular, defendant Oppenheim searched Mr. Gabbert's pocket-book/wallet; his calendar, which contained extensive handwritten notes, including client names, addresses and telephone numbers; a tablet of paper, which contained a list of client names with corresponding billing information; and his eye-glass case. Complaint, ¶¶ 41-42. While it might be reasonable to assume that a file folder would contain

correspondence, it is unreasonable to expect that an attorney's wallet, calendar or eye-glass case would contain several pages of correspondence. The search of these items was constitutionally impermissible, as the defendants reasonably should have been aware.

The second search of Mr. Gabbert was also unreasonable in that repetitive searches are not permissible without additional authority. 2 W.R. La Fave, *Search & Seizure* § 4.10(d). The additional searches of Mr. Gabbert's files by defendants Zoeller, Conn and Najera, see *Complaint*, ¶¶ 44-45, were not authorized by the warrant or section 1524. In fact, both the warrant and the statute explicitly prohibited the additional searches. That is, the warrant plainly states that the search of Mr. Gabbert was to be conducted "through Special Master Elliot Oppenheim." *Complaint*, Exhibit C at p. 44. Moreover, section 1524 states that no one other than the special master shall "examine any of the items being searched . . . except upon agreement of the party upon whom the warrant has been served." Penal Code § 1524(e); *Complaint*, ¶ 35. Under these circumstances, the repetitive searches of Mr. Gabbert were objectively unlawful.

2. The Second Claim For Relief – Substantive Due Process

A claim for substantive due process may form the basis for a section 1983 claim. See, e.g. *Cooper v. Dupnik*, 963 F.2d 1220, 1245-48 (9th Cir.), *cert. denied*, 113 S.Ct. 407 (1992); *Harrington v. Almy*, 977 F.2d 37, 43 (1st Cir. 1992). In *Rochin V. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209,

96 L.Ed. 183 (1952) the Supreme Court held that substantive due process is violated when the government engages in activities which "shock the conscience." *Rochin* outlawed all government conduct that "offend(s) those canons of decency and fairness which express the notions of justice of English-speaking people even toward those charged with the most heinous offenses." *Cooper v. Dupnik*, 963 F.2d 1248-49, quoting *Rochin*, 342 U.S. at 169, 72 S.Ct. at 208. Phrased another way, "malicious, irrational and plainly arbitrary actions are not within the purview of the state's power." *Sinaloa Lake Owner's Ass'n v. City of Simi Valle*, 882 F.2d 1398, 1409 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990).

The Supreme Court has not articulated specific standards for identifying what constitutes a substantive due process claim. *Cooper*, 963 F.2d at 1249. Thus, the Ninth Circuit has recognized that determining whether particular conduct "shocks the conscience" is necessarily a fact intensive issue. *Id.* While noting that substantive due process claims most frequently arise in police brutality cases, the courts in both *Cooper, supra*, and *Wood v. Ostrander, supra*, concluded that excessive force is merely an example of such a violation, but by no means exhausts the possibilities. *Cooper*, 963 F.2d at 1249; *Ostrander*, 879 F.2d at 589. Thus, to establish a substantive due process claim, plaintiff is not required to point to a prior holding on the same facts. See *Bonitz v. Fair*, 804 F.2d 164, 172 and n.9 (1st Cir. 1986) (specific judicial articulation of right not required; to require prior holding on specific facts would actually reward the government for inventing ever more egregious conduct.) and *Cannon v. Macon County*, 1 F.3d 1558, 1564-65 (11th Cir. 1993), *mod. on reh'g*, 15 F.3d

1022 (1994) (requiring prior holding on materially similar facts "would add an unwarranted degree of rigidity to the law of qualified immunity") (citation omitted).

There are several elements to Mr. Gabbert's substantive due process cause of action. Complaint, ¶ 57. The constitutional underpinning of each of the discrete claims is that the searches at issue, particularly their manner, timing and execution, violated Mr. Gabbert's sixth amendment right and obligation to effectively represent, assist and counsel his client, Tracy Baker. Furthermore, as a concomitant of the violation of his sixth amendment rights, Ms. Baker's constitutional right to counsel, right to privacy and right against self-incrimination were also violated. The separate elements of plaintiff's substantive due process claim will be addressed below.

a. The Defendants' Conduct Impermissibly Intruded Into Plaintiff's Relationship With His Clients In Violation Of The Sixth Amendment And Mr. Gabbert Has Standing To Challenge Those Violations

1) Standing

The sixth amendment right to assistance of counsel is "of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions.' " *Powell v. Alabama*, 287 U.S. 45, 67, 53 S.Ct. 55, 77 L.Ed. 158 (1932), quoting *Herbert v. Louisiana*, 272 U.S. 312, 316, 47 S.Ct. 103, 71 L.Ed. 270 (1926). The concept of the right to counsel is necessarily included in the concept of due process of law. *Powell*, 287 U.S. at 67;

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 403 (1963). See also *United States v. Flanagan*, 679 F.2d 1072, 1075 (3d Cir. 1982), *rev'd on other grounds*, 465 U.S. 259 (1984) (defendant's decision to select attorney protected by sixth amendment and fifth amendment due process clause); accord, *Davis v. Stamler*, 650 F.2d 477, 479-80 (3d Cir. 1981). A necessary component of the right to counsel is the right to effective assistance of counsel. *United States v. Cronin*, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044, 80 L.Ed.2d 657 (1984); *Keker v. Procunier*, 398 F.Supp. 756, 675 (E.D. Cal. 1975); *Poe v. United States*, 233 F.Supp. 173 (D.D.C. 1964), *aff'd*, 352 F.2d 639 (D.C. Cir. 1965).

The "mirror image of the client's right to effective assistance of counsel is the attorney's right to practice his profession" according to the highest standards of that profession and without governmental interference. *Keker*, 398 F.Supp. at 756; *Wounded Knee Legal Defense/Offense Committee v. Federal Bureau of Investigation*, 507 F.2d 1281, 1284 (8th Cir. 1974); *Nyberg v. City of Virginia*, 495 F.2d 1342 (8th Cir.), *cert. denied*, 419 U.S. 891 (1974) (physician's right to practice profession or engage in occupation). As the court in *Keker* pointed out,

the foundation of the legal practice is the right to maintain privacy and freedom from intrusion essential to the attorney-client relationship.

398 F.Supp. at 761. Thus, because an attorney's interest in vindicating his right to practice his chosen profession is "so closely linked with the rights of the client," an attorney has standing to assert the sixth amendment rights of his client. *Keker*, 398 F.Supp. at 765 ("vindication of one right is consequently dependent on vindication of the other"); *Wounded Knee*, 507 F.2d at 1284.

2) The Governmental Intrusion

As established above, "[i]t is clear that government interference with a defendant's relationship with his attorney may render counsel's assistance so ineffective as to violate his sixth amendment right to counsel." *United States v. Irwin*, 612 F.2d 1182, 1185 (9th Cir. 1980); see also *United States v. Johnson*, 818 F.Supp. 1004, 1006 (S.D. Texas 1993). Here, the defendants have unconstitutionally intruded into Mr. Gabbert's relationship with his clients, especially as to Ms. Baker, in myriad ways.

First, defendants Conn, Najera and Zoeller repeatedly questioned Ms. Baker, without Mr. Gabbert being present, but fully knowing that Mr. Gabbert represented Ms. Baker. Complaint, ¶¶ 18, 24, 26. It is well established that California's Rule of Professional Conduct 2-100, which prohibits an attorney from contacting a represented party without the consent of their counsel, is binding on prosecutors. See *United States v. Lopez*, 4 F.3d 1455, 1459 (9th Cir. 1993); *People v. Sharp*, 150 Cal.App.3d 13, 197 Cal.Rptr. 436 (1983); *People v. Manson*, 61 Cal.App.3d 102, 132 Cal.Rptr. 265, 301 (1976), cert. denied, 430 U.S. 986 (1977) (prosecutor held to ethical rules because he "is not less a member of the State Bar than any other admitted lawyer"). Furthermore, at least two circuits have recognized that Rule 2-100's prohibition against communicating with represented parties can apply to pre-indictment situations and implicate sixth amendment concerns. *United States v. Lopez*, 4 F.3d at 1461 (a prosecutor is bound by Rule 2-100 at the moment of indictment at the very latest); *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871

(1990). The Ninth Circuit concluded that adherence to Rule 2-100 is necessary because:

the trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition. As a result, uncurbed communications with represented parties could have deleterious effects well beyond the context of the individual case, for our adversary system is premised upon functional lawyer-client relationships.

989 F.2d at 1036.

Second, defendants intentionally waited to serve Mr. Gabbert with the search warrant for his person and belongings until the precise moment in time that his client was about to appear before the grand jury. Complaint, ¶¶ 34-46. Indeed, in order to detain Mr. Gabbert so that the warrant could be issued before Ms. Baker commenced her grand jury testimony, defendants Conn and Najera falsely told Mr. Gabbert that they were having a letter prepared for Mr. Gabbert's review which would contain a proposed grant of immunity for Ms. Baker. Complaint, ¶ 33. An immunity letter was never provided to Mr. Gabbert. Instead, he was served with a search warrant. Complaint, ¶ 34.

It is constitutionally repugnant that Ms. Baker was compelled to appear before the grand jury while her lawyer was being detained by law enforcement authorities. As a result of defendants' conduct, when Ms. Baker requested to consult with her attorney, just prior to entering the grand jury room, she was prevented from obtaining his advice as to whether to assert her fifth

amendment privilege against self-incrimination because he was in another room being illegally searched. Complaint, ¶ 37. Despite both Mr. Gabbert's and Ms. Baker's protestations, Ms. Baker was ordered into the grand jury room. *Id.* In addition, during the course of her grand jury testimony, Ms. Baker asked to consult with her attorney. She was prevented from doing so until the search of Mr. Gabbert was completed. Complaint, ¶ 43. Mr. Gabbert was denied his right and obligation to provide his client with assistance of counsel. Ms. Baker was denied the advice of her counsel. A more fundamental and intentional intrusion into the attorney-client relationship cannot be imagined.

Third, the defendants' failure to adhere to the statutory mandates of Penal Code § 1524 violated the privacy rights of Ms. Baker, as well as the rights of other clients of Mr. Gabbert. As detailed above, rather than sealing the attorney-client privileged files in Mr. Gabbert's possession, defendants arbitrarily rifled through them and read portions of the documents contained therein. The Ninth Circuit has spoken loudly, in language particularly applicable here, with respect to this type of violation:

It is axiomatic that the attorney-client privilege confers upon the client an expectation of privacy in his or her confidential communications with the attorney. Neither the State of California, where the search took place, Congress nor the federal courts dispute this hornbook rule.⁸

⁸ It is also hornbook law that an attorney has standing to raise the attorney-client privilege on behalf of his client. *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976);

DeMassa v. Nunez, 770 F.2d 1505, 1507 (9th Cir. 1985). The expectation of a client's right to privacy in attorney-client files has its "source in federal and state statutes, in codes of professional responsibility, under common law and in the United States Constitution. *Id.* The sixth amendment provides a "source" and "understanding" of this expectation of privacy to the extent that effective assistance of counsel is at stake. *Id.* Moreover, "[b]ecause the Fifth Amendment's protection against testimonial self-incrimination may be threatened by the act of disclosure of legal files, that constitutional guarantee also supports the client's legitimate expectations of privacy." *Id.*

Because of the defendants' capricious conduct, Ms. Baker's privacy rights were violated, as well the rights of all of the other clients whose files were in Mr. Gabbert's possession at the time of the searches. In addition, Mr. Gabbert's own privacy rights were violated insofar as his attorney work-product was contained in the files searched. The search of his personal belongings, such as his calendar and wallet further violated his privacy rights of even greater significance, however, because of the defendants failure to follow a law specifically designed to protect against the kind of unprofessional and illegal conduct that occurred here, Mr. Gabbert was rendered impotent to protect the confidences with which his clients

United States v. King, 536 F.Supp. 253 (C.D. Cal. 1982) (fact that client is not a party to proceeding is irrelevant to issue of standing). See also *DeMassa v. Nunez*, 770 F.2d at 1506 (unlike fourth amendment rights which are personal, privacy rights may be vicariously asserted).

had entrusted him. Such conduct cannot be countenanced by a federal court.

c. As a Matter of Law, the Defendants' Violations Of Mr. Gabbert's Substantive Due Process Rights Cannot Be Deemed Reasonable.

On their face, the defendants multiple violations of Mr. Gabbert's substantive due process rights cannot, under any set of circumstances, be deemed reasonable for qualified immunity purposes. Moreover, the defendants should not be permitted even to raise the defense of qualified immunity as a potential bar to plaintiff's substantive due process claim. This is because, in practical terms, a "reasonableness" analysis is irrelevant where the standard governing the conduct at issue is whether it "shocks the conscience." Plainly, conduct which is so violative of the constitution that it "shocks the conscience" cannot, *a fortiori*, be reasonable – these are mutually exclusive concepts. See *Skelofilax v. Quigley*, 586 F.Supp. 532, 543 (D. N.J. 1984) (where conduct is found to have "shocked the conscience" defendants not entitled to qualified immunity as a matter of law).

As one author has observed:

To the extent that the plaintiff must prove a due process or cruel and unusual punishment violation, the immunity defense surely would be inappropriate. Proof of severe injury, malice, or conduct that shocks the conscience is thoroughly inconsistent with the notion of objectively reasonable or good faith conduct.

See *Urbonya, Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 Temp. L.Q. 61, 97-98 (1989) (contending that "malicious conduct is per se objectively unreasonable for the purpose of qualified immunity").

Indeed, several circuits have ruled that qualified immunity is not an appropriate defense in excessive force cases. See *Street v. Parham*, 929 F.2d 537 (10th Cir. 1991) (error to allow jury to consider qualified immunity in excessive force case); *Williams-El v. Johnson*, 872 F.2d 224 (8th Cir.), *cert. denied*, 493 U.S. 871 (1989); *Bates v. Jean*, 745 F.2d 1146, 1152 (7th Cir. 1984); *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988); *Fernandez v. Leonard*, 784 F.2d 1209, 1217 (1st Cir. 1986), *aff'd. on appeal*, 963 F.2d 459 (1992); *Stevens v. Corbell*, 832 F.2d 884 (5th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988); *Vizbaras v. Prieber*, 761 F.2d 1013, 1018-19 (4th Cir. 1985) (Winter, J., concurring and dissenting), *cert. denied*, 474 U.S. 1101 (1986); and *Clark v. Beville*, 730 F.2d 739, 740 (11th Cir. 1984). Such analysis is consistent with the Ninth Circuit's resolution of the qualified immunity issue in excessive force cases. See, e.g. *Cooper v. Dupnick*, *supra*, 963 F.2d at 1251 (where legal standards governing substantive due process claim were well established and conduct alleged shocked the conscience, qualified immunity not available as defense) and *Hammer v. Gross*, 932 F.2d 842, 850 (9th Cir.), *cert. denied*, 112 S.Ct. 582 (1991). (defendants allowed to raise qualified immunity defense where actions were "unreasonable in all circumstances, but below the level that shocks the conscience") The defendants' conduct here shocks the conscience and they should, therefore, be precluded from asserting a qualified immunity defense.

IV

CONCLUSION

For the foregoing reasons, defendants' plaintiff Paul L. Gabbert respectfully requests that this Court deny defendants' Motion to Dismiss pursuant to Fed.R.Civ.Proc. 12(b)(6) in its entirety.

DATED: August 26, 1994

Respectfully submitted,

MICHAEL J. LIGHTFOOT
CARLA M. WOHRLE
MELISSA N. WIDDIFIELD
TALCOTT, LIGHTFOOT,
VANDEVELDE
WOHRLE & SADOWSKY

/s/ Melissa N. Widdifield
By: MELISSA N. WIDDIFIELD
Attorneys for Plaintiff
Paul L. Gabbert

(VERIFICATION - 446 and 2015.5 C.C.P.)

STATE OF CALIFORNIA, COUNTY OF _____

I, the undersigned, declare: I am the _____

in the above-entitled action; I have read the foregoing

and know the contents thereof; and the same is true of my own knowledge, except as to the matters which are therein stated upon my information and belief, and as to those matters. I believe it to be true.

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date Type or Print Full Name of Declarant and if applicable Signature of Declarant

(PROOF OF SERVICE BY MAIL - 1013a, 2015.5 C.C.P.)
STATE OF CALIFORNIA COUNTY OF LOS ANGELES

I am a resident of [sic] employed in the aforesaid county, State of California: I am over the age of eighteen (18) years and not a party to the within action: my business address/residence address is: 655 SOUTH HOPE STREET, 13th FLOOR LOS ANGELES, CA 90017. I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service, and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business on AUGUST 26, 1994 19 _____. I served the foregoing PLAINTIFF GABBERT'S OPPOSITION TO DEFENDANTS' CONN AND NAJERA'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. PROC. 12(b)(6); MEMORANDUM OF POINTS & AUTHORITIES (set forth the exact time of the document served) on DEFENDANTS in this action by placing a true copy thereof, enclosed in a sealed envelope on this date at LOS ANGELES (place of business where the correspondence was placed for deposit in the United States Postal Service) California and placed for collection and mailing on this date following ordinary business practices addressed as follows

SEE ATTACHMENT

I certify (or declare) under penalty of perjury under the laws of the State of California, that the foregoing is true and correct

AUGUST 26, 1994 JUDY A. ALLEN (Date and Name of Declarant)

/s/ Judy A Allen
Signature of Declarant

ATTACHMENT

Elliott A. Oppenheim
1215 Beverly Estate Terrace
Beverly Hills, CA 90210

Kevin C. Brazile (BY PERSONAL SERVICE)
Principal Deputy County Counsel
648 Kenneth Hahn Hall of Administration
500 West Temple Street
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Paul L. Gabbert)	CASE NUMBER
Plaintiff,)	
vs.	)	CV CV 94-4227-ABC(Ex)
David Conn, et al	)	ORDER TO REASSIGN CASE
Defendant.	)	(Filed Jul. 8, 1994)

The undersigned Judge, to whom the above-entitled case was assigned pursuant to General Order 224, being of the opinion that he should not try said case, by reason of

My former position as Assistant District Attorney during the prosecution of this case

hereby orders the case reassigned by the Clerk in accordance with General Order 224, or other applicable rule or order of this Court (28 U.S.C. §137); and

IT IS FURTHER ORDERED that the Clerk serve copies of this Order forthwith by United States mail on counsel for all parties appearing in this case.

Dated: July 7, 1994

/s/ Audrey B. Collins
AUDREY B. COLLINS
UNITED STATES
DISTRICT JUDGE

NOTICE TO COUNSEL FROM CLERK:

This case has been reassigned to Judge RONALD S. W. LEW. On all documents subsequently filed in this case, please substitute the initials RSWL after the case number in place of the initials of the prior judge so that the case number will read CV 94-4227 RSWL (Ex).

This is very important because documents are routed to the assigned judges by means of the initials.

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 S. ROBERT AMBROSE, Assistant County Counsel
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 CONN and NAJERA

UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NO. CV 94-4227
Plaintiff,	)	RSWL (Ex)
vs.	)	DEFENDANTS CONN
DAVID CONN, CAROL	)	AND NAJERA'S REPLY
NAJERA, ELLIOT	)	MEMORANDUM OF
OPPENHEIM, LESLIE	)	POINTS AND
ZOELLER and DOES	)	AUTHORITIES IN
1 through X.	)	SUPPORT OF THEIR
Defendants.	)	MOTION TO DISMISS
	)	(Filed Sep. 1, 1994)
	)	DATE: SEPTEMBER 19,
	)	1994
	)	TIME: 9:00 A.M.
	)	COURTROOM: "21"

TO PLAINTIFF AND YOUR ATTORNEYS OF RECORD:

Defendants David Conn and Carol Najera hereby submit the attached Reply Memorandum of Points and Authorities in Support of their Motion to Dismiss.

Dated: August 31, 1994

DE WITT W. CLINTON
County Counsel

By /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy/County
Counsel

Attorneys for Defendants
CONN and NAJERA

MEMORANDUM OF POINTS AND AUTHORITIES

I. DEFENDANTS CONN AND NAJERA ARE IMMUNE FROM LIABILITY BECAUSE THEY DID NOT VIOLATE ANY CONSTITUTIONAL RIGHTS OF PLAINTIFF.

To overcome defendants Conn and Najera's affirmative defense of qualified immunity plaintiff must prove that the constitutional right allegedly violated was clearly established at the time of the officials allegedly impermissible conduct. See *Camarillo v. McCarthy* 998 F.2d 638, 639 (9th Cir. 1993); *Romero v. Kitsap County* 931 F.2d 624, 626 (9th Cir. 1991). A right is "clearly established" when the contours of the right are sufficiently clear that a reasonable official would understand that what he or she is doing violates the law. See *Anderson v. Creighton* 483 U.S. 635, 640, 107 S.Ct. 3034, 3099, 97 L.Ed.2d 523 (1987); *Camarillo v. McCarthy* id. at page 640.

According to the complaint, the rights of plaintiff that defendants allegedly violated were guaranteed by the Fourth and Sixth amendment. However, a review of the complaint and plaintiff's opposition papers reveals that plaintiff's Fourth and Sixth amendment rights were not violated by defendants Conn and Najera.

A. PLAINTIFF'S FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES WAS NOT VIOLATED BY DEFENDANTS.

The Fourth Amendment protects the right of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. See *U.S. v. Attson* 900 F.2d 1427, 1429 (9th Cir. 1990). However, the law is well established that a search warrant may be used to gather evidence of a crime. See *U.S. v. McLaughlin* 851 F.2d 283, 286 (9th Cir. 1988). Furthermore, the courts have held that there is no fourth amendment violation by officials who conduct a search pursuant to a facially valid warrant. See *Mills v. Graves* 930 F.2d 729, 731-732 (9th Cir. 1991).

Plaintiff challenges the warrant relied upon by defendants on the ground that the affidavit in support of the warrant contained false facts. See *Franks v. Delaware* 438 U.S. 154 (1978). According to the opposition papers the warrant affidavit, which was prepared by detective Leslie Zoeller, contained two (2) material misstatements of fact. Nevertheless, the *Franks* doctrine is not violated where there is sufficient content in the affidavit, apart from the

challenged material, to support a finding of probable cause. See *Mills v. Graves* id. at page 733.

A review of the affidavit submitted by defendant Zoeller in support of the warrant shows that notwithstanding the *alleged* false statements made by Conn, there were sufficient facts contained in the affidavit to state a substantial basis for a finding of probable cause. See e.g. *Mills v. Graves* id. at page 733. For example, at page 7 of detective Zoeller's affidavit, he states that Tracy Baker informed him that the primary object of the search warrant (correspondence) existed and was turned over to attorney Paul L. Gabbert. In addition, plaintiff was the attorney for Ms. Baker and when he accompanied Ms. Baker to the Criminal Courts Building he had several documents in his possession as well as a briefcase.

Since the affidavit of defendant Zoeller, notwithstanding the alleged false statements of defendant Conn, established probable cause to search plaintiff's belongings the warrant was valid. In otherwords, there was no violation of plaintiff's Fourth Amendment Rights because the warrant was supported by probable cause. See *U.S. v. Johns* 948 F.2d 599, 606 (9th Cir. 1991) (The government need not include all of the information in its possession to obtain a search warrant and the affidavit need only show facts adequate to support a finding of probable cause); See also *U.S. v. Garza* 980 F.2d 546, 550-551 (9th Cir. 1992).

To summarize, defendants Conn and Najera did not violate plaintiff's Fourth Amendment rights nor any other clearly established law because both searches of plaintiff were made pursuant to a valid search warrant.

Hence, when the Special Master (Oppenheim) conducted the first search of plaintiff, outside of Conn's and Najera's presence, neither Conn nor Najera violated plaintiff's Fourth Amendment Rights. As for the second search conducted by detective Zoeller and only *observed* by defendants Conn and Najera, neither Conn nor Najera violated any clearly established right of plaintiff, because once again the search was pursuant to valid warrant. Therefore, since the searches were conducted pursuant to a valid warrant, which is evident from the warrant affidavits attached to the complaints, defendants Conn and Najera should be granted qualified immunity to any Fourth Amendment based claim of plaintiff.

B. DEFENDANTS CONN AND NAJERA ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE PLAINTIFF'S SIXTH AMENDMENT RIGHTS WERE NOT VIOLATED.

Plaintiff makes the claim in his opposition papers that his client's Sixth Amendment rights were violated by the searches conducted on *him* pursuant to the facially valid search warrants. However, Plaintiff cannot base his Section 1983 claims on the violation of his client's Sixth Amendment right to Effective Assistance of Counsel, because a plaintiff in a Civil Rights Action brought under 42 U.S.C. Section 1983, only has standing to assert a violation of his *own* legal rights or interest. See *Warth v. Seldin* 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975) (Plaintiff must assert his own legal rights and cannot rest his claim to relief on the legal rights and interests of third parties); In accord, see *Secretary of State of Md. v. Joseph H. Munson Co.* 467 U.S. 947, 955; 104 S.Ct.

2839, 2846, 81 L.Ed.2d 786 (1984). See also *Rose v. City of Los Angeles*, 814 F.Supp. 878, 881 (C.D. Cal. 1993) (Federally protected rights that are enforceable under Section 1983 are personal to the injured party, and therefore, a Section 1983 claim must be based on the violation of plaintiff's personal rights, and not the rights of someone else.)

To the extent plaintiff bases his Section 1983 claims on the alleged violation of his client's (Tracy Baker) Sixth Amendment right to effective assistance of counsel, defendants Conn and Najure [sic] are entitled to qualified immunity, because plaintiff lacks standing to predicate his Section 1983 claim on the alleged violation of a third party's rights.¹ Moreover, since plaintiff lacks standing to raise his client's Sixth Amendment rights, he also lacks standing to assert a violation of the privacy rights of Ms. Baker or his other clients, as the basis for his Section 1983 claims, because he sustained no harm or injury by the alleged violation of his client's privacy rights. See e.g., *Conti v. City of Fremont*, 919 F.2d 1385, 1388 (9th Cir. 1990) (owner of entertainment business lacked standing to assert his patrons rights); *Darring v. Kincheloe*, 783 F.2d 874, 877-78 (9th Cir. 1986) (State prisoner who suffered no injury lacked standing to assert violation of other inmates' constitutional rights). It should also be noted that plaintiff lacks standing to base his Section 1983 claim on an alleged violation of his client's (Tracy Baker) Fifth Amendment Right against self-incrimination.

¹ Plaintiff's client, Tracy Baker, is not a party to the instant action.

Plaintiff cannot cogently argue that the searches somehow violated his own Sixth Amendment right to counsel, because the right to counsel does not attach until, "at or after the initiation of adversary judicial criminal proceedings - whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." See *Kirby v. Illionis* [sic], 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972); *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986). Thus, since plaintiff was never charged or arrested his Sixth Amendment rights were not violated.

II. DEFENDANTS' FAILURE TO ENSURE THAT PENAL CODE SECTION 1524 WAS COMPLIED WITH CONSTITUTES ONLY NEGLIGENCE.

In *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 666, 88 L.Ed.2d 662 (1986), the Supreme Court held that negligence is not cognizable under the civil rights act, by stating:

"Where a government official's act causing injury to life, liberty or property is merely negligent, no procedure for compensation is constitutionally required."

In accord with the case of *Daniels v. Williams, Id.*, is the companion case of *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), where the court ruled at page 670, as follows:

"In *Daniels*, we held that the Due Process clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property. In other words, where a government official is

merely negligent in causing the injury, no procedure for compensation is constitutionally required."

Plaintiff contends in his opposition papers at page 15, that defendants are liable under Section 1983 for:

"failing to ensure that the statutory mandates of California Penal Code Section 1542 were followed at the time Mr. Gabbert's privileged attorney-client files were searched."

Any failure by either Conn or Najera to "ensure" that defendants Oppenheim and Zoeller fully complied with Penal Code Section 1524 constitutes nothing more than negligence, which is not cognizable under Section 1983. Furthermore, defendants Conn and Najera cannot be held liable for Special Master Oppenheim's alleged failure to comply with Penal Code Section 1524, because they were not even present when he searched plaintiff. See *Palmer v. Anderson*, 9 F.3d 1433, 1438 (9th Cir. 1993) (No vicarious liability under Section 1983). Moreover, defendant Conn cannot be liable for failing to prevent detective Zoeller from searching plaintiff's files because, once again, vicarious liability does not apply to a Section 1983 claim.

The mere fact that defendants Oppenheim and Zoeller allegedly violated Penal Code Section 1524, does not, standing alone, constitute a Section 1983 claim, because Section 1983 claims must be predicated on the violation of a *specific* federal constitutional right. See *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986) (a Section 1983 claim must be based upon a specific constitutional guarantee); *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 624 (9th Cir. 1988) (To make out a cause of action under Section 1983, plaintiff must plead

... that defendants deprived plaintiff of rights secured by the constitution or federal statutes). Although plaintiff alleges that a few procedural requirements of Penal Code Section 1524 were violated, the Complaint fails to specify or articulate what federal rights were violated by the failure of others to comply with a few procedural provisions of a state law. Consequently, to the extent plaintiff's Section 1983 claim is based upon the violation of a state law it is not cognizable. See e.g. *Clark v. Link*, 855 F.2d 156, 161-163 (4th Cir. 1988) (defendants entitled to qualified immunity if Section 1983 action based solely on violation of state law.)

DATED: August 31, 1994

DE WITT W. CLINTON
County Counsel

By: /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy County Counsel

Attorneys for Defendants
CONN and NAJERA

PROOF OF SERVICE

STATE OF CALIFORNIA)
) s.s.
 COUNTY OF LOS ANGELES)

I am employed in the County aforesaid; I am over the age of eighteen and not a party to the within action; my business address is 500 West Temple Street, Los Angeles, California 90012.

On September 1, 1994, I served the within DEFENDANTS CONN AND NAJERA'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS in the case of *Paul L. Gabbert v. David Conn, et al.* **Case No. CV 94-4227 RSWL (Ex)** by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in a United States mail box in Los Angeles, California, addressed as follows:

Melissa N. Widdifield	Elliot A. Oppenheim
TALCOTT, LIGHTFOOT,	1215 Beverly Estate Terrace
VANDEVELDE	Beverly Hills, Ca. 90210
655 South Hope Street	
13th Floor	
Los Angeles, California 90017	

and that the person on whom said service was made has his office at a place where there is a delivery service by United States mail, and that there is a regular communication by mail between the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 1st day of September, 1994 at Los Angeles, California.

/s/ BARBARA J. HOLMES
BARBARA J. HOLMES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Paul L. Gabbert)	
)	
Plaintiff,	)	CV 94-4227-RSWL (Ex)
)	
vs.	)	ORDER
)	
David Conn, Carol Najera,	)	(Filed Sept. 30, 1994)
Elliot Oppenheim, Leslie)	
Zoeller and Does 1)	
through through [sic] X)	
)	
Defendants)	
)	

Two of the defendants in the above captioned action, David Conn and Carol Najera, have moved to dismiss Plaintiff Paul L. Gabbert's 42 U.S.C. § 1983 suit. Defendants Conn and Najera base their Fed. R. Civ. P. 12(b)(6) motion to dismiss on, alternatively: absolute immunity; qualified immunity; and lack of causation. The matter was set for oral argument on September 19, 1994, but was removed from the Court's law and motions calendar pursuant to Fed. R. Civ. P. 78, for disposition based on the papers filed.

Now, having carefully considered all of the papers filed in support of and in opposition to the motion, the Court hereby **GRANTS** in part and **DENIES** in part Defendants' Motion to Dismiss.

I. BACKGROUND

Plaintiff Gabbert is counsel for Tracy Baker, a witness in the recent Menendez brothers murder trial. In March of

1994, Baker was being investigated by the Los Angeles District Attorney's office for perjury during the Menendez trial. Baker was called to testify before a grand jury on this issue.

At the Beverly Hills courthouse on March 21, 1994, as Plaintiff escorted his client to the grand jury hearing, Plaintiff was served with a search warrant by Detective Leslie Zoeller.¹ While Baker testified before the grand jury, Plaintiff's person, briefcase, and accordion file were searched by Special Master Elliot Oppenheim.² Immediately after Oppenheim's search of Plaintiff, Plaintiff was searched again by Detective Zoeller. District attorneys David Conn and Carol Najera, the moving parties in this motion, were present during this second search of Plaintiff.

Plaintiff alleges that the search warrant was obtained illegally, that the material searched was protected by the attorney-client privilege, and that the search went beyond the scope of the warrant. Plaintiff has filed suit under 42 U.S.C. § 1983,³ claiming constitutional violations

¹ Leslie Zoeller is another defendant in this action but is not a party to this motion to dismiss.

² Oppenheim conducted the first search as a "special master" pursuant to Cal. Penal Code § 1524 (c) (1) which requires the appointment of a special master when a search warrant is issued for documentary evidence in the possession of a lawyer. Oppenheim is another defendant in this action, but is not a party to this motion to dismiss.

³ 42 U.S.C. § 1983 provides that

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or

including the sixth amendment right to counsel, fourth amendment, and substantive due process violations.

II. DISCUSSION

A. Standard for Dismissal Under Fed. R. Civ. P. 12(b)(6).

In a Rule 12(b)(6) motion to dismiss, the Court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the non-moving party. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987); *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981). A court need not, however, accept conclusory allegations or unreasonable inferences at face value. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), cert. denied 454 U.S. 1031, 102 S. Ct. 567 (1981). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); see also, *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). In deciding on a Rule 12(b)(6) motion to dismiss, the court generally may not consider material beyond the pleadings. *Branch v. Tunnell*, 14 F.3d 449, 453

causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(9th Cir. 1994). However, material which is properly submitted as part of the complaint may be considered, and documents whose contents are alleged in a complaint, and whose authenticity is not questioned may also be considered, even if the material is not physically attached to the complaint. *Id.* at 454.

B. Defendants Conn and Najera's First Ground For Dismissal: Absolute Immunity as Prosecutors.

Defendants first move that Plaintiff's § 1983 suit be dismissed against them on the grounds that, as prosecutors, they have absolute immunity from suit under § 1983.

The government official seeking absolute immunity bears the burden of showing that such immunity is justified for the action at issue. *Burns v. Reed*, ___ U.S. ___, 111 S. Ct. 1934, 1939 (1991). There is a presumption that qualified rather than absolute immunity is generally sufficient to protect government officials. *Id.* Absolute immunity is given sparingly. *Id.*

Prosecutors are entitled to absolute immunity from suit under § 1983 for conduct "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 411, 431, 96 S. Ct. 984, 995 (1976). In determining a prosecutor's immunity, the court looks at the function performed by the prosecutor, rather than the prosecutor's status as prosecutor.

Prosecutorial activities in initiating and pursuing prosecution are "functions to which the reasons for absolute immunity apply with full force," and prosecutors are

entitled to absolute immunity when performing those functions. *Id.*, However, prosecutors are not protected by absolute immunity when they act as police investigators rather than as advocates preparing for trial. *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S. Ct. 2606, 2616 (1993). In other words, when a prosecutor performs functions generally performed by detectives or police officers, he receives the immunity usually accorded those actions – i.e., qualified, not absolute immunity.

In order for Defendants to prevail on their claim for absolute immunity, they must show that they were functioning as advocates rather than as investigators. The *Buckley* Court found that a prosecutor cannot be acting as an advocate unless, as a threshold question, he has probable cause to initiate judicial proceedings. Even after a determination of probable cause, the prosecutor who engages in police investigative work receives only qualified immunity. 113 S. Ct. at 2616 & n.5. The question is not whether the conduct is related to the decision of whether to prosecute, but “whether the prosecutor’s actions are closely associated with the judicial process.” *Burns*, 111 S. Ct. at 1944.

Plaintiff argues that Defendants acted as police investigators, rather than advocates, because the “single purpose of the defendants conduct was to gather evidence.” *Opp.* at 12. Defendants’ purpose, however, is not the issue here, in that it is possible for prosecutors to be granted absolute immunity for investigative functions which are connected to their role as advocates. *Imbler*, 424 U.S. at 432, 96 S. Ct. at 995 n.33 (noting that the prosecutor’s role as advocate involves conduct preliminary to the

initiation of prosecution, including other actions outside the courtroom).

Rather, the issue is Defendants’ function during those investigations. Preparation for actions undertaken as an advocate may require investigative and administrative conduct which is shielded as connected to the prosecutor’s role as advocate. *Id.* As the Supreme Court has stated, “Drawing a proper line between these functions may present difficult questions.” *Id.* Similarly, Plaintiff’s assertion that Defendants were engaging in “quintessentially investigative conduct” begs the question of what role Defendants acted in while they were engaging in that conduct.

Plaintiff alleges that Defendants’ Conn and Najera delayed Plaintiff at the courthouse under the pretext of supplying Plaintiff with a letter granting his client immunity, until Plaintiff was served with the search warrant. Plaintiff further alleges that Conn and Najera were present when Plaintiff was served with the search warrant, and that Conn introduced Plaintiff to Special Master Oppenheim, who conducted the first search. Lastly, Plaintiff alleges that Conn and Najera were present for the second search and viewed Plaintiff’s documents during the search, after Conn informed Plaintiff that Special Master Oppenheim had determined nothing in the briefcase and files was privileged.

Taking all of the above allegations as true, and making all inferences in favor of the non-moving party as is required on a 12(b)(6) motion, the Court finds that the conduct of Defendants Conn and Najera constitutes participation in the investigations. Further, the Court finds

that these investigations were not connected to Defendants' role as advocates, but, rather, were pre-indictment evidence-gathering more associated with police functions. For those reasons, the Court **DENIES** Defendants Conn and Najera's claim to absolute immunity.

C. Defendants' Second Claim: Qualified Immunity as Government officials.

Alternatively, Defendants Conn and Najera move for dismissal of Plaintiff's § 1983 action on the basis of their qualified immunity as government officials. Qualified immunity shields government officials from suit for damages when they perform discretionary functions, and their conduct does not violate clearly established statutory or constitutional rights of which a reasonable official would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). The Ninth Circuit has set out a three prong inquiry for determining qualified immunity: identification of the specific right allegedly violated; determining whether it was so "clearly established" as to alert reasonable officers; and determining the ultimate issue of whether a reasonable officer could have believed the particular conduct was lawful. *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). Because this immunity is an immunity from suit, rather than merely a defense to liability, the Supreme Court has stressed the importance of resolving immunity questions as early as possible in litigation. *Hunter v. Bryant*, ___ U.S. ___, 112 S. Ct. 534 (1991).

1. Plaintiff's Conduct was Discretionary.

In general, only discretionary conduct by government officials is entitled to qualified immunity. *Harlow*, 457 U.S. at 816, 102 S. Ct. at 2737. Plaintiff contends that Defendants are not entitled to qualified immunity because their conduct in searching him was not discretionary. He contends that the Defendants' alleged supervision and participation in the search of Plaintiff was conduct governed by Cal. Penal Code § 1524(c)(2), which provides for special procedures when a search warrant is issued for documentary evidence in possession of an attorney. Plaintiff argues that, because Cal. Penal Code § 1524 is mandatory, Defendants' conduct was ministerial rather than discretionary and thus outside the scope of behavior protected by qualified immunity.

In order for Plaintiff to state a claim under 42 U.S.C. § 1983, Plaintiff must plead a violation of constitutional or federal law. Plaintiff contends this alleged violation of the state statute resulted in the deprivation of his constitutional rights. However, Plaintiff does not specify the constitutional deprivations to which the alleged violation of Cal. Penal Code § 1524 gives rise.

State law cannot be the basis for a § 1983 claim, unless the violation of the state law also results in a constitutional or federal law violation. *Long v. Norris*, 929 F.2d 1111, 1115 (6th Cir. 1991) (noting that "although Tennessee prison regulations may create a constitutional entitlement under the due process clause of the fourteenth amendment, they cannot change the standard of analysis for constitutional issues arising under the fourth amendment"). Thus, Plaintiff's argument that Defendants

have no qualified immunity on the grounds that they acted ministerially does not succeed, because he fails to state a § 1983 claim on that basis.

The Court finds that Defendants' conduct was discretionary.

2. Whether Defendants Violated Clearly Established Law.

The real issue in determining whether Defendants should be entitled to qualified immunity is whether the law governing their conduct was clearly established so that a reasonable officer would have known the conduct was unlawful. *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738. The threshold determination of whether the governing law was clearly established is a matter of law for the court to decide. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993) (citing *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738). However, where material issues of fact are in dispute, the case must proceed to trial. *Id.* at 873.

a. Whether Defendants Were the Cause of the Alleged Deprivations.

Plaintiff alleges numerous constitutional violations. The first issue to be determined, however, is whether Defendants were sufficiently involved in the alleged unconstitutional conduct to be liable under § 1983. Essentially, Plaintiff alleges that Defendants proximately caused the alleged constitutional violations in two ways:

a) they directed or supervised others in the unconstitutional behavior; and b) they directly participated in the second search.

i. Vicarious Liability Not a Basis for a § 1983 claim

Vicarious liability is not a basis for a § 1983 claim. *Monell v. Dep't. of Soc. Serv.*, 436 U.S. 658, 692, 98 S. Ct. 2018, 2036-37 (1978). However, supervision or direct participation in the unlawful conduct is a basis for liability under § 1983. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

ii. Causation Must Be Proximate.

Section 1983 further requires that a defendant's supervision or participation in the allegedly unconstitutional conduct must be the proximate cause of the deprivation. *Arnold v. Intern. Business Machines*, 637 F.2d 1350, 1355 (9th Cir. 1981).

Defendants contend that Plaintiff has failed to allege any direct participation or supervision on the part of Defendants Conn and Najera. They further contend that Plaintiff fails to show that any supervision or participation by Defendants caused the alleged deprivation of Plaintiff's constitutional rights.

Plaintiff's complaint alleges that Conn directed the search of Plaintiff at the courthouse on March 21, 1994 by Special Master Oppenheim, as well as the search by Detective Zoeller, and states that Najera and Conn were

not only present at the search but also "viewed" documents which were searched. It seems clear that Plaintiff's allegations, taken as true, do state facts showing direction and participation by Defendants. Moreover, it is apparent that such direction and participation would be considered a proximate cause of the constitutional deprivations which Plaintiff alleges. Defendants' lack of causation defense thus fails.

b. Alleged Constitutional Violations.

Plaintiff alleges a number of constitutional deprivations caused by Defendants, including substantive due process, fourth amendment, sixth amendment, and fourteenth amendment deprivations.

i. Fourth Amendment Violations.

a. Invalid Warrant.

Plaintiff alleges that Defendants Conn and Najera deprived him of his fourth amendment right, as incorporated through the fourteenth amendment, to be secure from unreasonable searches by conducting a search under an invalid warrant. The warrant is invalid, Plaintiff alleges, because it contains two material misstatements of fact made with the knowledge they were false. Under *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684-85 (1978), allegations of deliberate misstatements made by the affiant to a warrant entitle the defendant to an evidentiary hearing on the validity of the warrant. The *Franks* standard also defines the scope of qualified immunity in civil rights actions. *Branch v. Tunnell*, 937 F.2d

1382, 1387 (9th Cir. 1991) (*Branch I*) (citing *Rivera v. United States*, 928 F.2d 592, 604 (2d Cir. 1991)). However, Plaintiff does not allege that the actual affiant, Detective Zoeller, made the statements with the knowledge of their falsity, or with reckless disregard of the truth, as *Franks* requires. 438 U.S. at 171, 98 S. Ct. at 2684.

Additionally, Defendants respond that, even if the false statements were made intentionally or in reckless disregard of the truth, there is sufficient other material in the affidavit to support a finding of probable cause, which under *Franks* excuses the inaccuracies. *Id.* at 171-72, 98 S. Ct. at 2684. Defendants point to the affidavit as containing a statement from Plaintiff's client that the primary object of the search warrant, the alleged letter, had been turned over to Plaintiff.⁴ The affidavit states that Tracy Baker, Plaintiff's client, had informed the affiant that she had turned over the Menendez correspondence to her attorney, Plaintiff. This statement would be enough to support the issuing of the search warrant against Plaintiff Gabbert, even without the allegedly false statements.

Thus, the warrant is valid under either of Plaintiff's arguments, and the search conducted pursuant to it is likewise valid. The search was not clearly unlawful on the grounds of an invalid warrant, and under *Harlow*, Conn and Najera are entitled to qualified immunity on the

⁴ The affidavit and search warrant were attached to Plaintiff's complaint. Material such as subpoenas and search warrants attached as exhibits to plaintiff's complaint may properly be considered on a motion to dismiss. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) (*Branch II*).

charge that the search under the allegedly invalid warrant violated Plaintiff's fourth amendment rights.

b. Impermissibly Broad Execution of Warrant.

Secondly, Plaintiff alleges that Oppenheim's first search violated the fourth amendment because the search went beyond the scope of the warrant.⁵ He further alleges that the second search was invalid because it was "repetitive."

The warrant authorized a search of Plaintiff for "any and all correspondence between Tracy Baker and Lyle Menendez." (Complaint, Ex. C.). Plaintiff alleges that Oppenheim's search of Plaintiff's eyeglass case, memorandum calendar, and wallet/pocketbook went beyond the scope of the warrant because such correspondence would not reasonably be expected to be within those objects.

Police may search all items which legitimately might contain the objects specified in the warrant. *United States v. Grandstaff*, 813 F.2d 1353, 1358 (9th Cir. 1987); *United States v. Disla*, 805 F.2d 1340, 1347 (9th Cir. 1986). The warrant in question was for "correspondence." By definition, correspondence may include letters and notes on small pieces of paper. Such small pieces of paper might have been placed within Plaintiff's eyeglass case, wallet,

⁵ The following discussion of Oppenheim's search assumes, without determining, that Defendants Conn and Najera directed that search and thus were a cause of the alleged constitutional deprivation.

or calendar. The search of Plaintiff therefore did not go beyond the scope of the warrant and thus was not a violation of the fourth amendment on those grounds. On these grounds, Plaintiff cannot show that the search was clearly unlawful so as to overcome Defendants' claim to qualified immunity under *Harlow*.

Plaintiff further alleges that the second search of his personal effects was unauthorized by the warrant because it was "repetitive" and thus violated his rights under the fourth amendment. Plaintiff cites no case law to support his proposition that such searches are unreasonable. On the contrary, courts have allowed "second" searches under the same warrant, as long as the subsequent search could be considered a continuation of the first search. *United States v. Kaplan*, 895 F.2d 618, 623 (9th Cir. 1990) (holding that officer who visited defendant's offices to obtain specific files was allowed to return several hours later; second entry was considered continuation of the search); *United States v. Carter*, 854 F.2d 1102, 1107 (8th Cir. 1988) (officer's return to a motel room, several hours after a search, was valid because the authority of the search warrant had not expired).

The second search conducted by Zoeller on Plaintiff occurred soon after the first search conducted by Oppenheim, and thus would be considered a continuation of Oppenheim's search under *Kaplan*. In any event, the second search was not clearly unlawful so that a reasonable officer should have known it was illegal. The second search, like the first search, therefore does not meet the *Harlow* test for overcoming qualified immunity.

c. Violation of Cal. Penal Code
§ 1524

Plaintiff alleges that the search was unconstitutional on a third ground, because it was allegedly conducted in violation of Cal. Penal Code § 1524, as discussed above in section II.C.1. Again, a § 1983 claim must be premised on the violation of federal law or constitutional provision. *Long v. Norris*, 929 F.2d at 1114. The violation of Cal. Penal Code § 1524 in and of itself does not constitute a fourth amendment violation, nor does Plaintiff clearly allege that his substantive due process rights were violated by the alleged violation of the state statute. Officials sued for constitutional violations do not lose their qualified immunity in § 1983 actions merely because their conduct violates some state statutory or administrative provision. *Davis v. Scherer*, 468 U.S. 183, 194, 104 S. Ct. 3012, 3019 & n.12 (1984). The violating conduct must violate clearly established federal law. *Elder v. Holloway*, ___ U.S. ___, 114 S. Ct. 1019, 1023 (1994) (unanimous decision).

Even if Plaintiff alleged that Defendants' failure to follow the procedural requirements of Cal. Penal Code § 1524 constituted a fourteenth amendment deprivation, his claim would fail. While state law may create a property interest protected by the fourteenth amendment, a substantive property right cannot exist exclusively by virtue of a procedural right. *Dorr v. County of Butte*, 795 F.2d 875, 876, 877 (9th Cir. 1986).

ii. Intrusion into Client Relationships
as a Sixth Amendment Violation

Plaintiff alleges that Defendants, by causing the search warrant to be served upon him and participating in the search, rendered him incommunicado from his client who was simultaneously testifying before the grand jury, thereby violating his client's sixth amendment right to effective counsel.

a. Plaintiff's Standing to Raise
His Client's Sixth Amendment
Claim

Plaintiff has standing to assert his client Baker's sixth amendment claim⁶ under Wounded Knee Legal Defense/Offense Com. v. FBI, 507 F.2d 1281, 1284 (8th Cir. 1974) ("[A] lawyer has standing to challenge any act which interferes with his professional obligation to his client — and thereby, through the lawyer, invades the client's constitutional right to counsel."); *Keker v. Procunier*, 398 F. Supp. 756, 765 (E.D. Cal. 1975) (counsel forced to meet their imprisoned clients in poor conditions had standing to raise their clients' sixth amendment claims).

⁶ The record does not state whether or not Baker is actually a defendant in a criminal proceeding, although it appears that she was the object of a grand jury investigation. A violation of the attorney-client privilege implicates the sixth amendment only when it applies to the relationship between a criminal defendant and his attorney. *Partington v. Gedan*, 961 F.2d 852, 863 (9th Cir. 1992).

b. Interference with Attorney-Client Relationship and Prevention of Effective Counsel as a Sixth Amendment Violation

The question here is whether, for purposes of the *Harlow* test for qualified immunity, the law governing Defendants' behavior in searching Plaintiff and arguably interfering with his client's sixth amendment right to counsel was clearly established.

Plaintiff alleges that the serving of the search warrant upon him just as his client was called to testify in front of the grand jury was an interference with his client's sixth amendment right to effective assistance of counsel. Because of the serving of the search warrant and Oppenheim's subsequent search of Plaintiff, Plaintiff claims that his client was prevented from consulting with him immediately before and during her grand jury testimony. Plaintiff argues that this constitutes a violation of the Sixth Amendment.

Leaving aside the causation question of whether Defendants Conn and Najera were actually involved in timing the service of the search warrant to interfere with Plaintiff's representation of his client, the issue is whether such alleged interference is a violation of Baker's sixth amendment right to effective counsel. Governmental interference with the attorney-client relationship will constitute a violation of the sixth amendment only if the interference substantially prejudices the defendant. *United States v. Irwin*, 612 F.2d 1182, 1186-1187 (9th Cir. 1980); see *United States v. Glover*, 596 F.2d 857, 863-64 (9th Cir. 1979). Plaintiff makes no allegation that his client was

substantially prejudiced by his unavailability. For that reason, the law is not clearly established that Defendants' alleged interference⁷ with Plaintiff's representation of his client was unlawful. Under *Harlow*, Defendants Conn and Najera are thus entitled to qualified immunity on this issue.

c. Defendant's Contact of Plaintiff's Client as a Violation of Sixth Amendment

Plaintiff further alleges that Defendants Conn and Najera violated his client's sixth amendment rights by questioning her during a search of her home on March 18, 1994, despite knowing that she was represented by counsel, in violation of Cal. Prof. R. Conduct 2-100 (West Supp. 1994). Cal. Prof. R. Conduct 2-100 (A) provides that

While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

This rule has been found to apply to prosecutors pursuing a criminal case. *United States v. Lopez*, 4 F.3d 1455, 1459 (9th Cir. 1993). However, while Defendants Conn and Najera are bound by this rule and allegedly may have violated it, Plaintiff does not allege that this violation "substantially prejudiced" his client so that, under

⁷ Again, the Court assumes without determining that causation exists, even though Defendants Conn and Najera's causation of the alleged interference is far from clear.

United States v. Irwin, his client's sixth amendment rights have been violated. Further, as discussed above, violations of state law do not provide a claim under § 1983 unless the violations in some way implicate a violation of constitutional rights.

d. Invasion of Attorney-Client Privilege.

Plaintiff alleges that the search of his briefcase and files invaded the attorney-client privilege because privileged documents were viewed during the searches, and that his clients' sixth amendment rights were violated as a result. Plaintiff's allegations again fail to state a clearly established constitutional violation.⁸ "[S]tanding alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right." *Partington v. Gedan*, 961 F.2d 852, 863 (9th Cir. 1992) (quoting *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985)). Unless the interference with the attorney-client privilege substantially prejudices the defendant, an intrusion on the confidential relationship between a defendant and his attorney does not constitute a sixth amendment violation. *Partington*, 961 F.2d at 863; *Clutchette*, 770 F.2d at 1471 (citing *United States v. Irwin*).

⁸ Plaintiff alleges that not only Baker's files but other clients' files were viewed during this search. Plaintiff's clients whose files were viewed may have a privacy interest in the files, but Plaintiff does not have standing to raise his clients' fourth amendment claims. *DeMassa v. Nunez*, 770 F.2d 1505, 1506, 1507 (9th Cir. 1985).

Thus, case law does not establish that Defendants' conduct was clearly a violation of the sixth amendment. Again, Plaintiff fails to allege that his client was substantially prejudiced by Defendant's alleged interference with the attorney-client privilege. Thus, under *Harlow*, Defendants have a qualified immunity to Plaintiff's claim.

iii. Plaintiff's Fourteenth Amendment Right to Practice His Profession

Plaintiff alleges that Defendants' conduct interfered with his fourteenth amendment interest in practicing his profession. Such a right has been found to exist. *Keker v. Procnier*, 398 at 756; see *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972). At least one district court has found that prison officials impermissibly interfered with attorneys' fourteenth amendment rights when attorneys were forced to meet their clients in an overly warm interview room in which glass partitions hampered attorneys' ability to consult with their clients. *Kecker* [sic], 398 F. Supp. at 761.

To show that a right allegedly violated is "clearly established by law" under the *Harlow* test,

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 3039 (1987) (citations omitted).

Defendants' alleged plan to serve the search warrant upon Plaintiff as his client began testifying before the grand jury is arguably an interference with Plaintiff's fourteenth amendment right to practice his profession. Plaintiff contends that as a result of the serving of the search warrant and the subsequent search, he was prevented from advising his client immediately before and during the grand jury hearing, when his client specifically twice sought to consult with him. Additionally, when Plaintiff stated that his client's appearance needed to be delayed during his search, his client was instead ordered to immediately appear in front of the grand jury.

Viewing the evidence most favorably for Plaintiff on this motion to dismiss, the Court finds that Defendants did violate Plaintiff's clearly established fourteenth amendment right to practice his profession free from undue governmental interference. The Court thus DENIES Plaintiff's motion to dismiss this claim.

c. Substantive Due Process "Shocks the Conscience" Claim.

Lastly, Plaintiff claims that Defendants' conduct is so egregious that it "shocks the conscience" and violates substantive due process notions of decency and fairness. This "shock the conscience" test was first expressed in *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209 (1952), where police officers in search of evidence forcibly pumped the stomach of a criminal suspect. This type of substantive due process claim has most often been

invoked in relation to police brutality and unwanted body manipulation, but has also been applied to relentless questioning of a suspect. *Cooper v. Dupnik*, 963 F.2d 1220, 1249, 1250 (9th Cir. 1992).

The Supreme Court has not set out specific standards for the test. *Id.* The Court finds here that Defendants' alleged conduct was not so lacking in decency and fairness that their actions violated Plaintiff's substantive due process right. Thus, Defendants have qualified immunity for Plaintiff's substantive due process claim.

D. Qualified Immunity No Defense to Injunctive Relief

Qualified immunity is not a defense to a claim for injunctive relief. *American Fire v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991). Plaintiff petitions for both damages and injunctive relief. As discussed above, Plaintiff's claim for damages should be dismissed on the grounds that Defendants have qualified immunity which protects them from civil suits for damages, but Plaintiff's claim for injunctive relief is more appropriately considered on a motion for summary adjudication.

E. Leave to Amend Complaint

Fed. R. Civ. P. 15(a) states that leave to amend pleadings "shall be freely given when justice so requires." However, leave may be denied when amendment would cause undue delay, would be made in bad faith, would be futile, or would cause prejudice to the opposing party. *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973).

Leave to amend need not be granted if the court determines that allegation of other facts consistent with the challenged pleading could not correct the deficiency. *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988); *Schreiber Dist. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

In this case, the Court determines that it would be futile to grant Plaintiff leave to amend his pleadings in regard to his First Claim for damages, which alleges fourth amendment violations, and his second claim for damages, subsections (c) (alleged violation of fourth and fourteenth amendments based on Cal. Penal Code § 1524) (e) (alleged violation of sixth and fourteenth amendment based on Cal. R. Prof. Conduct 2-100), and (f) (alleged violation of attorney-client privilege). The court thus dismisses those claims without leave to amend.

IV. CONCLUSION

Defendants Conn and Najera's Rule 12(b)(6) motion to dismiss is hereby **DENIED** as to subsection (d) of Plaintiff's Second Claim for the violation of his fourteenth amendment right to practice his profession, and as to Plaintiff's claims for injunctive and declaratory relief. Defendants' Rule 12(b)(6) motion to dismiss is hereby **GRANTED** on the basis of qualified immunity as to Plaintiff's remaining claims for damages against Defendants Conn and Najera. Plaintiff's claims for fourth amendment violations, violations of the attorney-client privilege, violations of Cal. Rule Prof. Conduct 2-100, and

violations of Cal. Penal Code § 1524 are **DISMISSED WITH PREJUDICE. IT IS SO ORDERED.**

RONALD S.W. LEW

RONALD S.W. LEW

United States District Judge

DATED: September 27, 1994

CV 94-4227-RSWL *Galbert v. Conn, Najera et al.*, Defendants Conn and Najera' 12(b)(6) motion to dismiss.

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 DAVID CONN and CAROL NAJERA

UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NO.
Plaintiff,	)	CV 94-4227-RSWL (Ex)
vs.	)	ANSWER TO
DAVID CONN, CAROL	)	COMPLAINT BY
NAJERA, ELLIOT	)	DAVID CONN AND
OPPENHEIM, LESLIE	)	CAROL NAJERA
ZOELLER and DOES	)	DEMAND FOR
1 through X,	)	JURY TRIAL
Defendants.)	

Defendants, DAVID CONN and CAROL NAJERA, for themselves alone, separating themselves from all other defendants, answer plaintiff's unverified complaint, and admit, deny and allege as follows:

1. Defendants admit the allegations contained in paragraphs 3 and 27 of plaintiff's complaint.

2. Defendants lack sufficient information or belief to admit or deny the allegations contained in paragraphs 4, 5, 6, 7, 8, 9, 12, 14, 15, 19, 20, 21, 22, 23, 24, 28, 30, 31, 32, 33, 34, 34(a), (b), (c), 35, 36, 37 and 47 of the complaint, and based on said lack of information or belief defendants deny each and every allegation contained therein.

3. Defendants deny generally and specifically each and every allegations [sic] contained in paragraphs 1, 2, 10, 11, 13, 16, 17, 18, 25, 25(a), (b), (c), (d), (e), 26, 29, 38, 39, 40, 41, 41(a), (b), (c), (d), (e), (f), 42, 43, 44, 45, 46, 48, 50, 50(a), (b), (c), 51, 52, 53, 54, 55, 57, 57(a), (b), (c), (d), (e), (f), 58, 59, 60, 61 and 62 of the complaint.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

4. Defendants CONN and NAJERA are immune from civil rights liability under the doctrine of qualified immunity.

SECOND AFFIRMATIVE DEFENSE

5. Defendants CONN and NAJERA are immune from civil rights liability under the doctrine of quasi-judicial immunity.

THIRD AFFIRMATIVE DEFENSE

6. Defendants CONN and NAJERA are immune from civil rights liability because their acts were objectively reasonable and did not violate any clearly established federal law.

FOURTH AFFIRMATIVE DEFENSE

7. The defendants are immune from liability under the doctrine of official immunity.

FIFTH AFFIRMATIVE DEFENSE

8. The facts alleged in the Complaint do not involve any custom, practice, procedure or regulation of the defendants County of Los Angeles.

SIXTH AFFIRMATIVE DEFENSE

9. Defendants are not liable for damages under the Federal Civil Rights Act for negligence.

SEVENTH AFFIRMATIVE DEFENSE

10. Any and all official conduct taken by defendants was in good faith and without malicious intent to deprive plaintiff of his constitutional rights or to cause him other injury.

EIGHTH AFFIRMATIVE DEFENSE

11. Defendants acted at all times in good faith and with the reasonable belief their actions were valid.

NINTH AFFIRMATIVE DEFENSE

12. Plaintiff's causes of action under the Federal Civil Rights Act are barred as the Complaint fails to raise facts that go beyond mere tortious conduct and rise to the

dignity of a violation of a Federal Constitutional or statutory right.

TENTH AFFIRMATIVE DEFENSE

13. Plaintiff's alleged injuries were not proximately caused by any policy, custom, practice, procedure or regulation promulgated or tolerated by defendant County of Los Angeles.

ELEVENTH AFFIRMATIVE DEFENSE

14. These answering defendants were not the proximate cause of plaintiff's alleged deprivation of a constitutionally protected right, privilege or immunity.

TWELFTH AFFIRMATIVE DEFENSE

15. Plaintiff's complaint fails to state a cause of action against these answering defendants for, under *Monell v. Department of Social Services for the City of New York*, 436 U.S. 658 (1978), there can be no recovery for federal civil rights violations where there is no constitutional deprivation occurring pursuant to governmental custom.

THIRTEENTH AFFIRMATIVE DEFENSE

16. Plaintiff's attempt to recover punitive damages violates these answering defendants' constitutional rights to due process of law and protection from "excessive fines".

FOURTEENTH AFFIRMATIVE DEFENSE

17. A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person except as otherwise provided by statute.

FIFTEENTH AFFIRMATIVE DEFENSE

18. Plaintiff has failed to avoid or mitigate the alleged injuries and/or damages alleged in the Complaint and thus, any recovery should be reduced accordingly.

SIXTEENTH AFFIRMATIVE DEFENSE

19. Plaintiff's complaint fails to state facts sufficient to constitute a cause of action against these answering defendants.

SEVENTEENTH AFFIRMATIVE DEFENSE

20. The County of Los Angeles is not liable for an injury resulting from the act or omission of one of its employees where the employee is immune from liability pursuant to Government Code Section 815.2(b).

EICHTEENTH AFFIRMATIVE DEFENSE

21. Any and all acts or omissions of these answering defendants' agents or employees which allegedly caused the injury at the time and place set forth in the Complaint were the exercise of discretion vested in them and therefore there is no liability pursuant to Government Code Section 820.2.

NINETEENTH AFFIRMATIVE DEFENSE

22. A public employee is not liable for injury caused by his instituting or prosecuting any judicial proceeding within the scope of his employment pursuant to Government Code Section 821.6.

TWENTIETH AFFIRMATIVE DEFENSE

23. Defendant County of Los Angeles, its agents, officers an/or [sic] employees at no time assumed the duty and/or responsibility for conducting an investigation into the circumstances giving rise to plaintiff's injuries.

WHEREFORE, Defendants pray that:

1. Plaintiff take nothing by this action;
2. Defendants be awarded their costs of this suit; and
3. Defendants be awarded such other relief as the Court may deem just and proper.

DATED: October 17, 1994

DE WITT W. CLINTON
County Counsel

By: /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy
County Counsel

Attorneys for Defendants
DAVID CONN and CAROL NAJERA

DEMAND FOR JURY TRIAL

Defendants, DAVID CONN and CAROL NAJERA,
hereby demand a jury trial of all issues of fact properly
triable by jury.

DATED: October 17, 1994

DE WITT W. CLINTON
County Counsel

By: /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy
County Counsel

Attorneys for Defendants
DAVID CONN and CAROL NAJERA

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

PAUL L. GABBERT,)	CASE NUMBER
Plaintiff(s))	
vs.	)	CV 94-4227-RSWL (Ex)
DAVID CONN, et al.	)	PROOF OF SERVICE
Defendant(s)	)	ACKNOWLEDGEMENT
	)	OF SERVICE

I, the undersigned, certify and declare that I am over
the age of 18 years, employed in the County of Los
Angeles, State of California, and not a party to the above-
entitled cause.

On October 17, 1994 I served a true copy of:

— ANSWER TO COMPLAINT BY DAVID CONN
— AND CAROL NAJERA; DEMAND FOR JURY
— TRIAL

—
—
— by personally delivering it to person(s) indicated
below in the manner as provided in F.R.C.P. 5(b)

X by depositing it in the United States Mail, in a sealed envelope with the postage fully prepaid and addressed to the following:

Michael J. Lightfoot, Esq.
 Carla M. Woehrle, Esq.
 Melissa N. Widdifield, Esq.
 Talcott, Lightfoot, Vandavelde, Woehrle
 & Sadowsky
 655 South Hope Street, 13th Floor
 Los Angeles, CA 90017

Place of mailing: 500 W. Temple Street, Los Angeles, California 90012.

Executed on October 17, 1994, at Los Angeles, California.

** — I hereby certify that I am a member of the Bar of the United States District Court, Central District of California.

** X I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

/s/ Kiyoko Wald
 Signature of person making service
 KIYOKO WALD

ACKNOWLEDGEMENT OF SERVICE

I, _____, received a true copy of the within document on _____, 1994.

 (Signature)

for

 (Party Served)

DE WITT W. CLINTON, County Counsel
 S. ROBERT AMBERSE, Assistant County Counsel
 DENNIS M. GONZALES, Principal Deputy County Counsel
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 CONN and NAJERA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NO. CV 94-4227 RSWL
Plaintiff,	)	(Ex)
vs.	)	NOTICE OF MOTION AND
	)	MOTION FOR SUMMARY
DAVID CONN,	)	JUDGMENT; MEMORANDUM
CAROL NAJERA,	)	OF POINTS AND
ELLIOT OPPENHEIM,	)	AUTHORITIES; SEPARATE
LESLIE ZOELLER	)	STATEMENT OF
and DOES 1 through	)	UNCONTROVERTED
X.	)	MATERIAL FACTS AND
	)	CONCLUSIONS OF LAW;
Defendants.	)	DECLARATIONS AND
	)	EXHIBITS IN SUPPORT OF
)	MOTION
)	(Filed Aug. 31, 1995)
)	DATE: SEPTEMBER 25, 1995
)	TIME: 10:00 A.M. 9:00
)	COURTROOM:

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 CONN and NAJERA

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NO. CV 94-4227
	)	RSWL (Ex)
Plaintiff,)	
	)	NOTICE OF MOTION
vs.	)	AND MOTION FOR
	)	SUMMARY JUDGMENT;
DAVID CONN, CAROL	)	MEMORANDUM OF
NAJERA, ELLIOT	)	POINTS AND
OPPENHEIM, LESLIE	)	AUTHORITIES;
ZOELLER and DOES 1	)	SEPARATE STATEMENT
through X.	)	OF UNCONTROVERTED
	)	MATERIAL FACTS AND
Defendants.	)	CONCLUSIONS OF LAW;
	)	DECLARATIONS AND
	)	EXHIBITS IN SUPPORT
	)	OF MOTION
)	
	)	DATE: SEPTEMBER 25,
	)	1995
	)	TIME: 9 10:00 A.M.
	)	COURTROOM:
)	

TO PLAINTIFF AND YOUR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on September 25, 1995, at 9 ~~10:00~~ a.m. in the Courtroom of the Honorable Ronald Lew, which is located at 312 North Spring Street, Los Angeles, California, Defendants David Conn and Carol Najera shall move for Summary Judgment to the above-entitled action on the grounds of: (1) qualified immunity; (2) absolute prosecutorial immunity; and (3) insufficient evidence for equitable relief.

This Motion for Summary Judgment shall be based upon this notice; the attached Memorandum of Points and Authorities; Separate Statement of Uncontroverted Material Facts and Conclusions of Law; Declarations, Exhibits, pleadings and files of this action and any other matter the court deems appropriate.

Dated: September 1, 1995

DE WITT W. CLINTON
County Counsel

By /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy County
Counsel

Attorneys for Defendants
CONN AND NAJERA

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

On June 23, 1994, plaintiff Paul Gabbert filed a federal civil rights action under 42 U.S.C. § 1983 against defendants David Conn, Carol Najera, Elliot Oppenheim and Leslie Zoeller. On August 5, 1994, defendants David Conn and Carol Najera filed a Motion to Dismiss plaintiff's action pursuant to Federal Rule of Civil Procedure 12(b)(6). On September 30, 1994, this court issued an order, which granted in large part, defendant's Conn and Najera's Motion to Dismiss. A true and correct copy of the court's September 30, 1994, order is attached hereto and incorporated herein by reference as Exhibit "1". The factual background of this case is set forth in this court's

order of September 30, 1994, at page 2, and therefore, defendants will adopt the court's statement of facts for purposes of this Motion.

Since this Court's order of September 30, 1994, granted in large part defendant's Motion to Dismiss, the sole and remaining claim in this action is plaintiff's fourteenth amendment right to practice his profession free from undue governmental interference. See Exhibit "1" at page 20.

II. DEFENDANTS CONN AND NAJERA ARE ENTITLED TO QUALIFIED IMMUNITY TO PLAINTIFF'S FOURTEENTH AMENDMENT CLAIM.

It is well settled that the defense of qualified immunity protects government officials performing discretionary functions from liability for civil damages when their conduct does not violate clearly established law that a reasonable person could have known. See *Romero v. Kitsap County* 931 F.2d 624, 627 (9th Cir. 1991); *Shoshone-Bannock Tribes v. Fish & Game Comm. Idaho* 42 F.3d 1278, 1285 (9th Cir. 1994). Regardless of whether a constitutional violation occurred a government official should prevail under the qualified immunity defense if the right asserted by the plaintiff was not clearly established or if the official could have reasonably believed that his or her conduct was lawful. See *Romero v. Kitsap County* id. at page 627; *Hemphill v. Kincheloe* 987 F.2d 589, 591-593 (9th Cir. 1993); *Armendariz v. Penman* 31 F.3d 860, 864-865 (9th Cir. 1994).

When the defendant raises the affirmative defense of qualified immunity, the initial burden is upon the plaintiff to show that the rights were clearly established, after

which the defendant bears the burden of proving that his conduct was reasonable. See *Romero v. Kitsap County* id. at page 627; *Shoshone-Bannock Tribes v. Fish & Game Comm. Idaho* id. at page 1285.

In *Romero v. Kitsap County* id. at page 627, this Circuit set forth the three (3) inquiries necessary for the determination of qualified immunity,¹ by stating:

"The qualified immunity test necessitates three inquiries: (1) the identification of the specific right allegedly violated; (2) the determination of whether that right was so "clearly established" as to alert a reasonable officer to its constitutional parameters; and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue."

A necessary concomitant to the determination of whether the constitutional right asserted by the plaintiff is clearly established at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. See *Seigert v. Gilley* 500 U.S. 226, 232 (1991); *Armendariz v. Penman* id. at page 865.

A. DEFENDANTS CONN AND NAJERA DID NOT VIOLATE ANY CLEARLY ESTABLISHED LAW.

A right is clearly established for qualified immunity purposes if the contours of the right are sufficiently clear

¹ See also *Shoshone-Bannock Tribes v. Fish & Games Comm. Idaho* id. at page 1285;

that a reasonable official would understand that what he is doing violates the law. See *Anderson v. Creighton* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Aldrich v. Knal* 858 F.Supp. 1480, 1500 (W.D. Wash. 1994); *Camarillo v. McCarthy* 998 F.2d 638, 639 (9th Cir. 1993). To determine whether a right is clearly established in the absence of binding precedent, a court should look at all available decisional law including decisions of state courts, other circuits, and district courts². See *Romero v. Kitsap County* 931 F.2d 624, 629 (9th Cir. 1991); *Ward v. County of San Diego* 791 F.2d 1329, 1332 (9th Cir. 1986). However, for qualified immunity purposes, a right must be clearly established in a particularized and relevant sense. See *Block v. Mendoza* 27 F.3d 1357, 1360 (9th Cir. 1994). Thus, although the very action in question need not have previously been held unlawful, the unlawfulness must be apparent in light of preexisting law. See *Block v. Mendoza* 27 F.3d 1357, 1360, (9th Cir. 1994); *Anderson v. Creighton* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987); *Maciariello v. Summer* 973 F.2d 295 298 (4th Cir. 1992) (officials are not liable for bad guesses in gray areas; they are only liable for transgressing bright lines).

In order for the plaintiff to carry his burden that defendants Conn and Najera violated his clearly established rights he must show that the illegality of the challenged conduct was clearly established in factual circumstances that are closely analogous to this action. See *Richardson v. Oldham* 12 F.3d 1373, 1381 (5th Cir. 1994).

² However, a single District Court decision does not clearly establish the law. See *Hawkins v. Steingut* 829 F.2d 317, 321 (2nd Cir. 1987).

Hence, the plaintiff must demonstrate that, by the time in question, there were fairly analogous precedents establishing that defendants conduct violated the law. See *Horta v. Sullivan* 4 F.3d 2, 13 (1st Cir. 1993).

A review of the undisputed facts in this action clearly shows that defendants Conn and Najera did not violate any of plaintiff's clearly established constitutional rights. The gist of plaintiff's fourteenth amendment claim of interference with his right to practice profession is that he was searched by Defendant Oppenheim while his client was testifying before the grand jury.

One reason why the fact that Oppenheim searched plaintiff when his client was testifying before the grand jury is not a violation of any clearly established law is because plaintiff did not have a right to be present in the grand jury hearing room when his client, Tracy Baker, testified. For example, under California law a witness testifying before the Los Angeles County grand jury is not entitled to have counsel present. See *People v. Dale* (1947) 79 Cal.App.2d 370, 376 ("It is clear that one who is being investigated by a grand jury is not entitled to be represented by counsel before that body"); and in accord, see *Clark v. Superior Court* (1961) 190 Cal.App.2d 739, 742. It is also the rule in California that anyone subpoenaed to testify before the grand jury cannot have an attorney present when he or she testifies at the grand jury. See *Farnow v. Superior Court* (1990) 226 Cal.App.3d 481, (Judicial Commissioner was not allowed to have counsel present when he testified before the County grand jury). See also California Penal Code Section 939.

The federal courts have also held that there is no right to counsel before the grand jury. See *Brewer v. Williams* 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (The sixth amendment right to counsel does not attach at the grand jury stage); *U.S. v. Mandujano* 425 U.S., 564, 583, 96 S.Ct. 1768, 1779, 48 L.Ed.2d 212 (1976) ("under settled principles the witness may not insist upon the presence of his attorney in the grand jury room or examine other witnesses).

Since neither plaintiff nor his client had a constitutional right to have counsel present in the grand jury room when Tracy Baker testified, defendants Conn and Najera did not violate any clearly established law when they participated in the grand jury proceeding at the same time that plaintiff was being searched by Defendant Oppenheim. Moreover, Plaintiff has conceded in his deposition that he knew beforehand that he would not be allowed to accompany his client or be present in the grand jury hearing room when she testified. See Uncontroverted Material Fact No. 3. Plaintiff also concedes that defendants Conn and Najera did not participate in the first search conducted by Oppenheim and that Conn and Najera were not present when plaintiff was subjected to the first search by Oppenheim. See uncontroverted Fact Nos. 7-10. In addition, it should be noted that plaintiff contends that the only time he was prevented from giving legal advice to his client was when he was being searched by Oppenheim. See Fact 21.

There exists no binding case precedent that an attorney's fourteenth amendment right to practice his profession without interference is somehow violated when he is subjected to a search, pursuant to a valid warrant and by

a special master, while his client is testifying before the grand jury.³ Furthermore, there is no case law that is analogous to the present action, so that it would have been apparent and clear to defendants Conn and Najera that they somehow committed a constitutional violation by examining Tracy Baker before the grand jury while her counsel, Paul Gabbert, was being searched pursuant to a valid search warrant.

Another reason why Conn and Najera did not violate any clearly established law is because plaintiff was given access to his client by both Conn and Najera. To illustrate, when Tracy Baker was called before the grand jury she advised Defendant Najera that she wasn't able to speak with her attorney because, "he's still with the special master". See Exhibit "2" at page 25. Next, she asked permission to confer with plaintiff for a moment, and therefore, the foreperson of the grand jury allowed Ms. Baker to leave the grand jury hearing room to speak with her attorney. See Exhibit "2" at page 25.

When Ms. Baker returned to the grand jury room after apparently speaking with her attorney she exercised her fifth amendment right against self incrimination, and then asked to confer with her counsel again. See Exhibit "2" at page 26. Consequently, the foreperson of the grand jury once again granted her request to speak with her counsel. See Exhibit "2" at pages 26-27. Upon her return to the grand jury room Ms. Baker, upon the advise [sic] of

³ The present action is factually distinguishable from *Keker v. Procunier* 398 F.Supp. 756, 761 (E.D. Cal; 1975), which involved a prison environment and where the inmates Sixth Amendment Rights were applicable.

counsel, again exercised her fifth amendment right against self-incrimination. See Exhibit "2" at page 27. Thereafter, defendant Najera asked Ms. Baker if she brought the documents specified in the subpoena, and in response Ms. Baker asked to confer once more with her attorney. See Exhibit "2" at page 27. Thus, a 10-minute recess was taken and Ms. Baker was excused to consult with her attorney. See Exhibit "2" at pages 28-29. After the recess Ms. Baker returned to the grand jury hearing room, wherein she was advised by the grand jury foreperson, to go to Dept. 110 of the Superior Court for a contempt proceeding. See Exhibit "2" at pages 30-31.

The contempt proceeding was conducted on March 21, 1994, at 11:40 a.m. in Department 110. See Exhibit "2" at page 33. Plaintiff represented his client at the contempt proceedings at all times. See Exhibit "2" at pages 35-36.

There is no binding case precedent to support the proposition that a prosecutor who is conducting a grand jury examination of a witness, and then allows the witness to consult with her attorney, upon the witnesses's request, by leaving the grand jury room, somehow violates the witnesses' attorney's constitutional rights. Moreover, there is no analogous case precedent that even suggests that a prosecutor commits a constitutional violation by *granting* a grand jury witness's request to confer with her attorney. Hence, in light of the absence of binding or analogous case precedent that the conduct of Conn and Najera was unlawful, then neither Conn nor Najera knowingly violated clearly established law. See *Schroeder v. McDonald* 55 F.3d 454, 461 (9th Cir. 1995) (qualified immunity gives ample room for mistaken judgments by

protecting all but the plainly incompetent or those who knowingly violate the law).

The facts of the case at bar are somewhat analogous to the case of *In Re Grand Jury Proceedings of John Doe v. U.S.* 842 F.2d 244 (10th Cir. 1988). In *John Doe*, a fifteen (15) year old minor was held in contempt for refusing to testify before the grand jury. The minor contended that his Sixth Amendment rights were violated by the Court refusing to permit his counsel to be present in the grand jury room or to permit the minor to write down the questions and come out after each question and be advised by his attorney. The Tenth Circuit held that the minor's Sixth Amendment rights were not violated because the prosecutors did not refuse to permit the minor to confer with his counsel outside the grand jury room and because the minor was not denied access to his attorney in the hallway.

In Comparison to the *John Doe* case, here Defendants Conn and Najera did not refuse or deny Ms. Baker's requests to leave the grand jury room or to consult with her attorney. In addition, Conn and Najera did not deny Ms. Baker access to her attorney who was in an adjacent area. Since both Conn and Najera allowed Ms. Baker to leave the grand jury room to consult with her attorney each time she made such a request, and because plaintiff was nearby at all times, defendants Conn and Najera did not violate any clearly established law.⁴

⁴ Plaintiff alleges that he was only denied access to his client and prevented from giving her legal advice during the search conducted by Oppenheim, which occurred while Conn and Najera were before the Grand Jury. See Uncontroverted Facts 19 and 21.

Unless plaintiff can articulate some pre-existing and clearly established law that Conn and Najera violated, then both Conn and Najera are entitled to qualified immunity.

B. THE CONDUCT OF CONN AND NAJERA WAS OBJECTIVELY REASONABLE.

The rule of qualified immunity provides ample support to all but the plainly incompetent or those who knowingly violate the law. *See Burns v. Reed* 500 U.S. 478, 494-495, 111 S.Ct. 1934, 114 L.Ed 2d 547 (1991); *Schroeder v. McDonald* 55 F.3d 454, 461 (9th Cir. 1995). Therefore, regardless of whether the constitutional violation occurred, a government official is immune from civil rights liability if he or she could have reasonably believed that his or her particular conduct was lawful. *See Romero v. Kitsap County* 931 F.2d 624, 627 (9th Cir. 1991); *Schroeder v. McDonald* 55 F.3d 454, 461 (9th Cir. 1995); *Armendariz v. Penman* 31 F.3d 860, 864-865 (9th Cir. 1994).

A review of the undisputed facts shows that the conduct of defendants Conn and Najera was objectively reasonable in light of pre-existing law. For example, according to plaintiff there was only one (1) occasion that he was denied access to his client, which was when he was being searched by Special Master Oppenheim.⁵ *See* Uncontroverted Material Fact No. 19. Plaintiff also alleges that the only occasion he was prevented from giving legal advice to Tracy Baker was when he was searched by

⁵ The search conducted by Oppenheim was the first search conducted on plaintiff on March 21, 1994.

Oppenheim. *See* Uncontroverted Material Fact No. 21. Furthermore, it is undisputed that the only participants in the first search were Oppenheim and plaintiff. *See* Uncontroverted Material Fact Nos. 7-10. Finally, it is uncontroverted that during all or most of the first search both Conn and Najera were before the grand jury examining Tracy Baker. *See* Exhibit "2"; and declarations of David Conn and Carol Najera.

Since Conn and Najera were before the grand jury when the first search was being conducted, and because as a matter of law, plaintiff was not allowed to be present in the grand jury room, then neither Conn nor Najera denied plaintiff access to his client during the first search. Moreover, Conn and Najera did not prevent plaintiff from giving legal advice to his client, because each time Tracy Baker made a request to seek the advice of or confer with her counsel she was allowed to do so. *See* Exhibit "2" at pages 25, 26, and 27. It should also be noted that each time Baker returned to the Grand Jury room after being excused to confer with her counsel, she asserted her fifth amendment right against self-incrimination, *on the advice of counsel*, and she never advised anyone in the grand jury or prosecutors Conn and Najera, that she had not conferred with her attorney. *See* Exhibit "2" at pages 25-29.

Due to the fact Tracy Baker always invoked her fifth amendment right on the advice of counsel and because each request she made to confer with her attorney was granted, it was objectively reasonable for Conn and Najera to believe that Tracy Baker had consulted with her attorney. *See* declarations of Conn and Najera. The only reasonable conclusion to be drawn from the Grand Jury

transcript (Exhibit "2"), of Tracy Baker's testimony is the one (1) drawn by Conn and Najera; specifically, that Tracy Baker had conferred with her attorney each time she asked to do so.

Thus, the Grand Jury transcript (Exhibit "2") clearly supports Conn and Najera's objective belief that plaintiff was not denied access to her attorney, because each time she asserted her fifth amendment rights she did so upon the advice of counsel. Therefore, it was reasonable for Conn and Najera to believe that plaintiff was never denied access to his client. *See* Declarations of Conn and Najera.

Even if one were to conclude that Conn and Najera deprived plaintiff of a clearly established right when he was searched by Oppenheim, the conduct of Conn and Najera was objectively reasonable in light of clearly established law for the following reasons: (1) each request by Tracy Baker to confer with plaintiff was granted; (2) Tracy Baker never advised anyone that she did not confer with her attorney; and (3) she indicated that she had consulted with her attorney by asserting her fifth amendment privilege on the advice of counsel. *See e.g. In Re Grand Jury Proceedings of John Doe v. U.S.* 842 F.2d 244, 248 (10th Cir. 1988).

Turning now to the second search conducted by Leslie Zoeller, both plaintiff and Tracy Baker alleged that it lasted about five (5) minutes. *See* Uncontroverted Material Facts nos. 17 and 33. Furthermore, it is undisputed that Tracy Baker was present during most if not all of the second search. *See* Uncontroverted Material Facts nos. 16, 30, 32 and 33. It is also uncontroverted that the second

search commenced *after* Tracy Baker's grand jury testimony ended. *See* Uncontroverted Material Fact No. 32. Moreover, immediately after the second search plaintiff conferred with his client. *See* Uncontroverted Material Fact No. 20 and 49.

Since the grand jury testimony of Baker was in recess when the second search began, and because plaintiff conferred with his client after the second search and represented her at the contempt proceeding, the conduct of Conn and Najera was objectively reasonable. Lastly, due to the fact that plaintiff concedes he was not denied access to his client nor prevented from giving her legal advice after the first search, any conduct of Conn and Najera related to the second search was objectively reasonable and within the ambit of qualified immunity.

III. DEFENDANTS CONN AND NAJERA ARE ENTITLED TO ABSOLUTE PROSECUTORIAL IMMUNITY WITH REGARD TO THE FIRST SEARCH OF PLAINTIFF.

In *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 123 (1976), the U.S. Supreme Court established the rule that prosecutors are entitled to absolute immunity from liability under the Civil Rights Act, 42 U.S.C. Section 1983, for any acts or omissions performed within the course and scope of their authority or closely associated with the criminal process. In *Imbler*, plaintiff, who was convicted of murder, brought a civil rights action under 42 U.S.C. Section 1983 against the prosecuting attorney on the grounds that the prosecutor knowingly used false testimony and suppressed material evidence in

order to convict plaintiff of murder. The issue before the court in *Imbler* was whether a prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution could be held liable under Section 1983. The Court held that the prosecutor was entitled to absolute immunity for both initiating and pursuing the criminal prosecution, by stating:

"We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force . . . We hold only that in initiating a prosecution and presenting the state's case, the prosecutor is immune from a civil suit for damages under § 1983."

In *Burns v. Reed*, 500 U.S. ___, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991), the court held that a prosecutor has absolute immunity from liability for damages under 42 U.S.C. Section 1983 for participating in a probable cause hearing. In *Burns*, the prosecutor participated in a probable cause hearing where he examined a witness and successfully supported an application for a search warrant. The Supreme Court held that the foregoing activities of the prosecutor fell within the bounds of absolute prosecutorial immunity, by stating at page 1942 as follows:

"The prosecutor's actions at issue here - appearing before a judge and presenting evidence in support of a motion for a search warrant - clearly involve the prosecutor's role as advocate for the state, rather than his role as administrator or investigative officer . . .

'Moreover, since the issuance of a search warrant is unquestionably a judicial act, appearing at a probable cause hearing is intimately associated with the judicial phase of the criminal process . . . ' Accordingly, we hold that respondent's appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing are protected by absolute immunity."

In *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S.Ct. 2606, 2615, 125 L.Ed 2d 209 (1993), the Supreme Court once again held that a prosecutor is entitled to absolute immunity when acting as an advocate for the state, preparing for trial or seeking an indictment before a grand jury, by stating:

"We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made."

In determining whether a particular act or conduct of a prosecutor is entitled to absolute immunity or qualified immunity the Supreme Court has applied a functional approach which looks to the nature of the function performed, not the identity of the actor who performed it. See *Buckley v. Fitzsimmons* id. 113 S.Ct. at page 2613. Thus, whenever a prosecutor's function is an advocate for the

state or closely associated with the judicial process, absolute prosecutorial immunity applies. See *Buckley v. Fitzsimmons* id. 113 S.Ct. at page 2613-2616.

In the instant action, defendants Conn and Najera were before the grand jury examining Tracy Baker when plaintiff, Paul Gabbert, was being searched by Special Master Elliott Oppenheim. See Uncontroverted Material Facts 7-10. It is also undisputed that neither Conn nor Najera participated in the first search of plaintiff by Oppenheim because they were before the grand jury. See Uncontroverted Material Facts 7-10.

Since Conn and Najera were before the grand jury as an advocate for the state when the first search of plaintiff occurred they are entitled to absolute prosecutorial immunity. For example, in *Gray v. Bell* 712 F.2d 490, 502 (D.C. Cir. 1983), the court held that a prosecutor is entitled to absolute immunity for conduct during and/or related to grand jury proceedings, by stating:

"We regard it as settled that presentation of evidence to an indicting grand jury falls within the scope of *advocatory* prosecutorial conduct protected by Imbler. Participation in grand jury proceedings is a vital and customary part of a prosecutor's duties . . . We therefore hold that the trial court was fully justified in concluding that, in the instant case the presentation of evidence to the grand jury indisputably is an *advocatory* function of a prosecutor." (Emphasis added)

The Ninth Circuit has also held that a prosecutor has absolute immunity when he presents evidence to a grand jury. see *Marlowe v. Coakley* 404 F.2d 70, 70-71 (9th Cir.

1968); see also *Fine v. City of New York* 529 F.2d 70, 73 (2nd Cir. 1975). The U.S. Supreme Court has also recognized that prosecutors have absolute immunity for their conduct before a grand jury. See *Burns v. Reed* supra 111 S.Ct. at page 1941, footnote 6; *Yaselli v. Goff* 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed.2d 395 (1927).

In the case at bar, plaintiff contends that the sole and only occasion that he was allegedly prevented from giving legal advice to his client or having access to his client was when he was searched by defendant Elliott Oppenheim. Defendants Conn and Najera had no personal participation in this search, and they did not direct or supervise Oppenheim's search, because they were [sic] engaged before the grand jury when the first search occurred. Since Conn and Najera did not participate in, direct or supervise the first search they cannot be held liable for any constitutional violations caused by the first search. See *Taylor v. List* 880 F.2d 1040, 1045 (9th Cir. 1989) and *Palmer v. Sanderson* 9 F.3d 1433, 1438 (9th Cir. 1993) (doctrine of vicarious liability or respondeat superior liability is not applicable to Section 1983 claims).

Thus, as a result of Conn and Najera performing an examination of Tracy Baker before the grand jury when the first search occurred, they are now entitled to absolute prosecutorial immunity for any constitutional violations caused by the first search. See *Burns v. Reed* id. 111 S.Ct. at page 1941, footnote 6.

IV. PLAINTIFF'S CLAIM FOR INJUNCTIVE AND DECLARATORY RELIEF IS BARRED BECAUSE THERE IS NO LIKELIHOOD OF RECURRING OR THREATENED INJURY.

Equitable relief is unavailable under 42 U.S.C. Section 1983, absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged; or in otherwords, a likelihood of substantial and immediate irreparable injury. *See City of Los Angeles v. Lyons* 461 U.S. 95, 111, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *O'Shea v. Littleton* 414 U.S. 488, 502, 94 S.Ct. 669, 679, 38 L.Ed.2d 674 (1974). Thus, absent a sufficient likelihood that the plaintiff will again be wronged in a similar way, a plaintiff is no more entitled to an injunction than any other citizen of Los Angeles because a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officials are unconstitutional. *See City of Los Angeles v. Lyon* id. 461 U.S. at 111; *Warth v. Seldin* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

In accord with *Lyons* is the case of *Orantes-Hernandez v. Thornburgh* 919 F. 2d 549, 557 (9th Cir. 1990),⁶ where the court held that injunctive relief was inappropriate against government actions which allegedly violate the law when the injury or threat of injury is not real and immediate, but only conjectural or hypothetical. The Ninth Circuit in *Thornburgh* also held that a showing of relatively few

⁶ See also *Smith v. City of Fontana* 818 F.2d 1411, 1421 (9th Cir. 1987).

instances of violations by defendants, without any showing of a deliberate policy on behalf of the named defendants, does not provide a basis for equitable relief id. at page 558.

In the present action, plaintiff's claim for injunctive and declaratory relief is based upon a single incident of alleged unconstitutional conduct that occurred on March 21, 1994. However, there is no evidence that since March 21, 1994, plaintiff has been subjected to any other searches, while a client of his was testifying before a grand jury. Furthermore, there is no evidence that plaintiff will be subjected to a search in the future, while his client testifies before a grand jury. In addition, plaintiff has no evidence of a deliberate policy by any defendant to subject attorneys to searches, pursuant to a valid warrant, while their clients are testifying before a grand jury. Therefore, unless plaintiff can produce evidence of a real and immediate threat of injury defendants are entitled to summary judgment on plaintiff's claims for Declaratory or Injunction Relief. *See Celotex v. Catrett* 477 U.S. 317, 106, S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

Dated: September 1, 1995

DE WITT W. CLINTON
County Counsel

By /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy County
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 COUNTY OF LOS ANGELES, et al.,

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NUMBER
Plaintiff(s))	
vs.	)	CV 94-4227-RSWL (Ex)
)	
DAVID CONN, CAROL	)	PROOF OF SERVICE
NAJERA, ELLIOT)	
OPPENHEIM, LESLIE	)	ACKNOWLEDGEMENT
ZOELLER and DOES 1	)	OF SERVICE
through X.)	
Defendant(s))	

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the above-entitled cause.

On August 31, 1995, 1995 I served a true copy of:

XXXX NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT MEMORANDUM OF POINTS AND AUTHORITIES; SEPARATE

STATEMENT OF UNCONTROVERTED MATERIAL FACTS AND AND [sic] CONCLUSIONS OF LAW; DECLARATIONS AND EXHIBITS IN SUPPORT OF MOTION

By personally delivering it to person(s) indicated below in the manner as provided in F.R.C.P. 5(b)

XXXX By depositing it in the United States Mail, in a sealed envelope with the postage fully prepaid and addressed to the following:

Melissa N. Widdifield
 Talcott, Lightfoot,
 Vandavelde, Woehrle
 & Sadowsky
 655 South Hope Street,
 13th Fl.
 Los Angeles, Ca. 90017

Scott D. MacLatchie
 Franscell, Strickland,
 Roberts & Lawrence
 225 S. Lake Ave. Penthouse
 Pasadena, Ca. 91101

Place of mailing: 500 W. Temple Street, Los Angeles, California 90012.

Executed on August 31, 1995, 1995, at Los Angeles, California.

/s/ Barbara J. Holmes
BARBARA J. HOLMES

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Attorneys for Defendant
 CONN and NAJERA

UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NO. CV 94-4227
Plaintiff,	)	RSWL (Ex)
vs.	)	SEPARATE STATEMENT
DAVID CONN, CAROL	)	OF UNCONTROVERTED
NAJERA, ELLIOT	)	MATERIAL FACTS AND
OPPENHEIM, LESLIE	)	CONCLUSIONS OF LAW
ZOELLER and DOES 1	)	(Filed Aug. 31, 1995)
through X.	)	DATE: SEPTEMBER 25,
Defendants.	)	1995
	)	TIME: 10:00 A.M. 9:00
	)	COURTROOM:
)	

TO PLAINTIFF PAUL GABBERT AND YOUR ATTOR-
 NEY OF RECORD:

Defendants David Conn and Carol Najera hereby submit
 the attached statement of uncontroverted material facts
 and conclusions of law.

Uncontroverted Material Facts

1. On March 21, 1994, plaintiff met his client, Tracy Baker at the Los Angeles Criminal Courts building at about 7:30 a.m.
Supporting Evidence: Exhibit "3" at pages 33-34 of Transcript.

Uncontroverted Material Facts

2. On March 21, 1994, plaintiff met Tracy Baker on the 13th floor where the grand jury room is located.
Supporting Evidence: Exhibit "3" at page 34 of transcript.

Uncontroverted Material Facts

3. Prior to Ms. Baker's testimony plaintiff knew he would not be allowed in the grand jury hearing room with her and that he had to remain outside in the waiting area.
Supporting Evidence: Exhibit "3" at page 35 of transcript.

Uncontroverted Material Facts

4. Plaintiff checked Tracy Baker in with the grand jury bailiff at 8:30 a.m. on March 21, 1994.
Supporting Evidence: Exhibit "3" at pages 36-37 of transcript.

Uncontroverted Material Facts

5. Tracy Baker's testimony before the grand jury began at 10:54 a.m. on March 21, 1994.
Supporting Evidence: Exhibit "4".

Uncontroverted Material Facts

6. After Defendants Conn and Najera entered the grand jury hearing room. Tracy Baker was taken before the grand jury.
Supporting Evidence: Exhibit "3" at pages 50-51 of transcript.

Uncontroverted Material Facts

7. Immediately after defendant Zoeller presented

plaintiff with a search warrant for his person and briefcase, Tracy Baker was called before the grand jury.

Supporting Evidence: Exhibit "3" at page 53 of transcript.

Uncontroverted Material Facts

8. Once plaintiff was presented with the search warrant he said "we'll need a private room," and then plaintiff and Oppenheim went to a private room.
Supporting Evidence: Exhibit "3" at pages 54.

Uncontroverted Material Facts

9. After being presented with the warrant, plaintiff and Oppenheim went into an office space alone.
Supporting Evidence: Exhibit "3" at pages 55-56, 61-62 of transcript.

Uncontroverted Material Facts

10. Plaintiff was only searched by Oppenheim during the first search.

Supporting Evidence: Exhibit "3" at pages 56-57, 67-68 of transcript.

Uncontroverted Material Facts

11. While plaintiff was being searched by Oppenheim he was advised that his client wanted to speak with him.
Supporting Evidence: Exhibit "3" at page 57 of transcript.

Uncontroverted Material Facts

12. The second search of plaintiff occurred after Oppenheim completed his search of plaintiff's briefcase.
Supporting Evidence: Exhibit "3" at page 69 of transcript.

Uncontroverted Material Facts

13. Defendants Conn and Najera were present when the

second search of plaintiff, by defendant Zoeller, was commenced outside of the grand jury hearing room.
Supporting Evidence: Exhibit "3" at page 70 of transcript.

Uncontroverted Material Facts

14. During the second search defendant Conn left and Najera stayed with Zoeller until Zoeller completed the search.
Supporting Evidence: Exhibit "3" at pages 70-71 of transcript.

Uncontroverted Material Facts

15. Defendant Carol Najera conducted all of the examination and questioning of Tracy Baker before the grand jury.
Supporting Evidence: Declaration of Carol Najera at paragraphs 4-7.

Uncontroverted Material Facts

16. Tracy Baker was present and outside of the grand jury hearing room when Zoeller conducted the second search.
Supporting Evidence: Exhibit "3" at pages 71-72 of transcript.

Uncontroverted Material Facts

17. The second search conducted by Zoeller on plaintiff lasted about five (5) minutes.
Supporting Evidence: Exhibit "3" at pages 71-72 of transcript.

Uncontroverted Material Facts

18. After the second search plaintiff conferred with Tracy Baker in a private room about what she was being asked in the grand jury.
Supporting Evidence: Exhibit "3" at pages 73, 107-108 of transcript.

Uncontroverted Material Facts

19. Plaintiff contends that the only occasion he didn't

have access to his client, in his mind, was when he was being searched by Oppenheim.
Supporting Evidence: Exhibit "3" at pages 76-77 of transcript.

Uncontroverted Material Facts

20. Plaintiff conferred with Tracy Baker before the contempt proceeding commenced in Dept. 110 before Judge Florence Marie Cooper.
Supporting Evidence: Exhibit "3" at page 78 of transcript.

Uncontroverted Material Facts

21. Plaintiff contends and alleges that the only time he was prevented from giving legal advice to his client on March 21, 1994 was when he was being searched by Oppenheim.
Supporting Evidence: Exhibit "3" at page 83 of transcript.

Uncontroverted Material Facts

22. Plaintiff did not sustain any loss of earnings due to the incident.
Supporting Evidence: Exhibit "3" at page 84 of transcript.

Uncontroverted Material Facts

23. Plaintiff did not sustain any medical expenses due to the incident.
Supporting Evidence: Exhibit "3" at pages 83-84 of transcript.

Uncontroverted Material Facts

24. Plaintiff never advised defendant Conn that his client (Baker) wanted to speak with him (Gabbert)
Supporting Evidence: Exhibit "3" at pages 99-100 of transcript.

Uncontroverted Material Facts

25. On March 21, 1994 while in the courthouse cafeteria and before Tracy Baker testified before the grand

jury she was given legal advice by plaintiff.
Supporting Evidence: Exhibit "5" at pages 43-44 of transcript.

Uncontroverted Material Facts

26. After leaving the courthouse cafeteria Baker and plaintiff went to check in with the grand jury bailiff.
Supporting Evidence: Exhibit "5" at page 46 of transcript.

Uncontroverted Material Facts

27. While in the hallway during a 45 minute period of time before her grand jury testimony began plaintiff gave Baker legal advice.
Supporting Evidence: Exhibit "5" at page 47 of transcript.

Uncontroverted Material Facts

28. When Baker entered the grand jury hearing room defendants Conn and Najera were inside of the grand jury hearing room.
Supporting Evidence: Exhibit "5" at page 55 of transcript.

Uncontroverted Material Facts

29. After Baker was allowed to leave the grand jury room at her request, she got an indication from plaintiff that she should go back in to the grand jury and assert her fifth amendment right.
Supporting Evidence: Exhibit "5" at pages 58-59; and 61 of transcript.

Uncontroverted Material Facts

30. Tracy Baker was present and outside the grand jury room when Zoeller searched plaintiff.
Supporting Evidence: Exhibit "5" at pages 67-68 of transcript.

Uncontroverted Material Facts

31. Tracy Baker believed plaintiff would be in the waiting area while she testified before the grand jury.

Supporting Evidence: Exhibit "5" at pages 68-69 of transcript.

Uncontroverted Material Facts

32. After defendant Conn advised Baker she was going to be held in contempt she exited the grand jury hearing room where she observed Zoeller searching plaintiff.

Supporting Evidence: Exhibit "5" at pages 76, 88-89 of transcript.

Uncontroverted Material Facts

33. Tracy Baker believes Zoeller searched plaintiff for about five or ten minutes while she was present.

Supporting Evidence: Exhibit "5" at pages 87-88 of transcript.

Uncontroverted Material Facts

34. Tracy Baker believes Conn and Najera were present when Zoeller searched plaintiff.

Supporting Evidence: Exhibit "5" at pages 89 of transcript.

Uncontroverted Material Facts

35. Zoeller did not find anything he was looking for at the conclusion of his search of plaintiff.

Supporting Evidence: Exhibit "5" at page 89 of transcript.

Uncontroverted Material Facts

36. Tracy Baker knew she would be questioned about Lyle Menendez before she went before the grand jury.

Supporting Evidence: Exhibit "5" at page 95 of transcript.

Uncontroverted Material Facts

37. On March 21, 1994 the grand jury proceedings began at 10:20 a.m.

Supporting Evidence: Exhibit "2" at page 1 of transcript.

Uncontroverted Material Facts

38. On March 21, 1994 the grand jury proceeding was conducted for investigative purposes only and not an indictment.

Supporting Evidence: Exhibit "2" at pages 2-9 of transcript.

Uncontroverted Material Facts

39. On March 21, 1994, Leslie Zoeller was the first person to testify before the grand jury.

Supporting Evidence: Exhibit "2" at page 11 of transcript.

Uncontroverted Material Facts

40. Tracy Baker was called to testify before the grand jury after Leslie Zoeller.

Supporting Evidence: Exhibit "2" at page 24 of transcript.

Uncontroverted Material Facts

41. Tracy Baker was questioned before the grand jury by Carol Najera.

Supporting Evidence: Exhibit "2" at page 24 of transcript.

Uncontroverted Material Facts

42. When Tracy Baker was asked before the grand jury whether she was acquainted with Lyle Menendez she asked for permission to confer with her attorney for a moment.

Supporting Evidence: Exhibit "2" at page 25 of transcript.

Uncontroverted Material Facts

43. Pursuant to her request Tracy Baker was allowed to leave the grand jury room to confer with her attorney.

Supporting Evidence: Exhibit "2" at page 25 of transcript.

Uncontroverted Material Facts

44. When Tracy Baker was recalled before the grand jury and again was asked if she was acquainted with Lyle Menendez, on the advice of counsel she asserted her fifth amendment privilege.

Supporting Evidence: Exhibit "2" at page 26 of transcript.

Uncontroverted Material Facts

45. When Ms. Baker was asked did she know Lyle Menendez in August, 1989, she again asked to confer with counsel and her request was granted and she exited the grand jury.

Supporting Evidence: Exhibit "2" at pages 26-27 of transcript.

Uncontroverted Material Facts

46. When Tracy Baker was asked a second time, if she knew Lyle Menendez in August of 1989, she once again, based on the advice of counsel, asserted her fifth amendment rights.

Supporting Evidence: Exhibit "2" at page 27 of transcript.

Uncontroverted Material Facts

47. When Tracy Baker was asked if she brought the documents called for in the subpoena she again asked to confer with her attorney.

Supporting Evidence: Exhibit "2" at page 27 of transcript.

Uncontroverted Material Facts

48. After Tracy Baker's request to confer with her attorney regarding the subpoena, the grand jury recessed so that a contempt hearing could be held in Dept. 110 before Judge Florence Marie Cooper.

Supporting Evidence: Exhibit "2" at pages 27-31 of transcript.

Uncontroverted Material Facts

49. Plaintiff attended and represented his client at the contempt proceeding in Department 110.

Supporting Evidence: Exhibit "2" at page 36 of transcript.

Uncontroverted Material Facts

50. Tracy Baker's grand jury testimony was completed at 11:12 a.m.

Supporting Evidence: Exhibit "4".

Uncontroverted Material Facts

51. The contempt proceeding commenced at 11:40 a.m.

Supporting Evidence: Exhibit "2" at page 33 of transcript.

Uncontroverted Material Facts

52. Defendants Conn and Najera did not refuse any of Tracy Baker's requests to confer with her attorney.

Supporting Evidence: Declaration of Conn at paragraph 8 and Najera at paragraph 8.

Uncontroverted Material Facts

53. Defendants Conn and Najera did not prevent Tracy Baker from conferring with her attorney.

Supporting Evidence: Declaration of Conn at paragraphs 4-8 and Najera at paragraphs 4-8.

Uncontroverted Material Facts

54. Defendants Conn and Najera did not deny Tracy Baker access to plaintiff.

Supporting Evidence: Declaration of Conn at paragraphs 4-7 and Najera at paragraphs 4-7.

Uncontroverted Material Facts

55. Defendants Conn and Najera did not deny Tracy Baker access to plaintiff.

Supporting Evidence: Declaration of Conn at paragraphs 4-8 and Najera at paragraphs 4-8.

Uncontroverted Material Facts

56. Defendants Conn and Najera did not deny plaintiff access to his client.

Supporting Evidence: Declaration of Conn at paragraphs 4-8 and Najera at paragraphs 4-8.

Uncontroverted Material Facts

57. Defendants Conn and Najera did not prevent plaintiff from conferring with his client.

Supporting Evidence: Declaration of Conn at paragraphs 4-8 and Najera at paragraphs 4-8.

Conclusion of Law

1. A prosecutor is entitled to qualified immunity when his conduct does not violate clearly established law. *Romero v. Kitsap County* 931 F.2d 624 (9th Cir. 1991).

2. A prosecutor is entitled to qualified immunity even if he mistakenly violates clearly established law when his conduct is objectively reasonable under preexisting law. *See Romero v. Kitsap County* id.

3. Plaintiff bears the burden of proof on establishing whether the law is clearly established. *See Romero v. Kitsap County* id.

4. A prosecutor is entitled to absolute immunity for conduct intimately associated with judicial phase of the criminal process. *See Imbler v. Pachtman* 424 U.S. 409 (1976).

5. A prosecutor is entitled to absolute immunity for conduct occurring during or related to grand jury proceedings. *See Gray v. Bell* 712 F.2d 490 (D.C. Cir. 1983); *Marlowe v. Coakley* 404 F.2d 70 (9th Cir. 1968).

6. The doctrine of vicarious liability does not apply to section 1983 claims. *See Palmer v. Sanderson* 9 F.3d 1433 (9th Cir. 1994).

7. Proximate cause is an essential element of a Section 1983 action. *See Arnold v. I.B.M.* 637 F.2d 1350 (9th Cir. 1981).

Dated: August 28, 1995

IT IS SO ORDERED.

DATED _____

UNITED STATES
DISTRICT JUDGE

DE WITT W. CLINTON
County Counsel

By /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy
County Counsel

Attorneys for Defendant
CONN and NAJERA

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 COUNTY OF LOS ANGELES, et al.,

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NUMBER
Plaintiff(s))	
vs.	)	CV 94-4227-RSWL (Ex)
)	
DAVID CONN, CAROL	)	PROOF OF SERVICE
NAJERA, ELLIOT)	
OPPENHEIM, LESLIE	)	ACKNOWLEDGEMENT
ZOELLER and DOES 1	)	OF SERVICE
through X.)	
Defendant(s))	

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the above-entitled cause.

On August 31, 1995, 1995 I served a true copy of:

XXXX SEPARATE JUDGMENT OF UNCON-
 TROVERTED MATERIAL FACTS AND CON-
 CLUSIONS OF LAW

By personally delivering it to person(s) indicated below in the manner as provided in F.R.C.P. 5(b)

XXXX By depositing it in the United States Mail, in a sealed envelope with the postage fully prepaid and addressed to the following:

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Executed on August 31, 1995, 1995, at Los Angeles, California.

/s/ Barbara J. Holmes
 BARBARA J. HOLMES

No. 97-1802

Supreme Court, U.S.
FILED
NOV 18 1998

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In The
Supreme Court of the United States

October Term, 1998

DAVID CONN and CAROL NAJERA,

Petitioners,

vs.

PAUL L. GABBERT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX
VOLUME II, PAGES 232 to 482

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Petition For Certiorari Filed May 4, 1998
Certiorari Granted October 5, 1998

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UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,) CASE NO.
Plaintiff,	) CV 94-4227 ABC (Ex)
)
vs.	) DEFENDANTS CONN AND
DAVID CONN, CAROL	) NAJERA'S DECLARATIONS
NAJERA, ELLIOT	) AND EXHIBITS IN SUPPORT
OPPENHEIM, LESLIE	) OF THEIR MOTION FOR
ZOELLER and DOES 1	) SUMMARY JUDGMENT
through X.)
Defendants.	) DATE: SEPTEMBER 25, 1995
	) TIME: 9:00 A.M.
	) COURTROOM:
)
_____	) (Filed Aug. 31, 1995)

TO PLAINTIFF AND YOUR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that Defendants Conn
 and Najera hereby submit the attached declarations and

Exhibits 1-5, in support of their Motion for Summary Judgment.

DATED: August 31, 1995 DE WITT W. CLINTON
County Counsel

By /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy
County Counsel

Attorneys for Defendant
County of Los Angeles

DECLARATION OF DAVID CONN

If called as a witness I could and would competently testify to all of the facts and information contained herein based upon my own, first-hand, personal knowledge.

1. I am an attorney at law duly licensed and practicing before all of the Courts of the state of California, and I am a Deputy District Attorney with the Los Angeles County District Attorneys Office. I have been employed with the District Attorneys office since 1978, and on March 21, 1994, I was one (1) of two (2) deputy district attorneys assigned as the prosecutors on the case entitled *People v Eric and Lyle Menendez*.

2. On March 21, 1994, Deputy District Attorney Carol Najera and I appeared before the Los Angeles County Grand Jury to question and examine Tracy Baker. Ms. Baker was subpoenaed to appear before the grand jury for investigative purposes only regarding a possible perjury committed by her during the first Menendez murder trial. The grand jury testimony of Ms. Baker began at

10:54 a.m. and was completed at 11:12 a.m. I was in the grand jury hearing room the entire time that Ms. Baker testified before the grand jury, and pursuant to California state law, her attorney remained outside of the grand jury hearing room at all times while she testified.

3. I gave an opening statement to the grand jury before any witness testified and I was present in the grand jury hearing room when the first witness, Beverly Hills Police Department detective Leslie Zoeller testified. The examination of Detective Zoeller was done by Deputy District Attorney Carol Najera. After the testimony of Detective Zoeller, which began at 10:26 a.m. and ended at 10:54 a.m., Tracy Baker was called before the grand jury.

4. When Tracy Baker appeared before the grand jury I believed that her attorney, Paul Gabbert, was outside of the hearing room, but nearby, because by law a witness who testifies before the grand jury is not allowed to have counsel present in the grand jury hearing room. When Tracy Baker was asked by Carol Najera during the grand jury proceeding, "Miss Baker, are you acquainted with the Defendant Lyle Menendez," she responded that she wasn't able to speak with her attorney because he was with the Special Master. Consequently, plaintiff was given permission to exit the grand jury room to confer with her attorney.

5. Pursuant to her request, Ms. Baker exited the grand jury room and returned a few minutes later. I did not do anything to prevent Ms. Baker from leaving the grand jury room to consult her attorney and while she was away I did not interfere or hinder her in consulting with her attorney. Upon her return to the grand jury

hearing room Ms. Baker was asked, once again, "are you acquainted with the defendant Lyle Menendez." In response she replied, "Based on the advice of my counsel, I respectfully decline to answer the question because my answer might tend to incriminate me." In light of the foregoing response, I believed that Ms. Baker had conferred with her attorney after she had left the grand jury proceeding, pursuant to her request; and that her attorney, plaintiff Paul Gabbert, had advised her to assert her Fifth Amendment privilege not to incriminate herself.

6. After Ms. Baker asserted her fifth amendment rights she was asked did she know Lyle Menendez in August of 1989? She responded by stating, "Again, I have to go confer with counsel . . . This is what I have been instructed to do." Consequently, Ms. Baker was again allowed to leave the grand jury proceeding to confer with her attorney. Upon her return to the grand jury proceeding Ms. Baker was again asked did she know Lyle Menendez in August of 1989; and she responded again, "Based on the advice of counsel," I decline to answer the question because my answer might incriminate me. Due to this response I believed that Ms. Baker had once again conferred with her attorney and that he had again advised her not to answer the question.

7. When Ms. Baker was asked whether she brought the documents specified in the subpoena, she asked if she could confer with her attorney again. Ms. Baker was again allowed to be excused from the grand jury and the grand jury took a ten (10) minute recess while she left. After the recess Ms. Baker returned to the grand jury hearing room and then she was advised to proceed to Department 110 of the Superior Court for a contempt

proceeding concerning her failure to produce the documents requested by the grand jury subpoena. It should also be noted that Ms. Baker was represented at the contempt proceeding by her attorney, Paul Gabbert.

8. During Ms. Baker's grand jury testimony she requested on three (3) separate occasions to confer with her attorney. all three (3) of her requests to confer with her attorney were granted and I believed she conferred with her attorney on each occasion because on two (2) occasions she asserted her fifth amendment privilege on, "the advice of counsel," and she never indicated or stated in any manner that she did not confer with her attorney when she was given permission to consult with him. Each time Ms. Baker requested to consult her attorney I did not do anything to prevent either of them from having access to one another. I did not say anything or do anything to prevent plaintiff from giving his client legal advice at any time. Moreover, each time Ms. Baker left the grand jury proceeding to confer with her attorney I remained either in the grand jury hearing room or away from her and plaintiff.

9. On March 21, 1994, a search warrant was issued for plaintiff that authorized Special Master Elliott Oppenheim to conduct a search of plaintiff. I did not order or direct the search of plaintiff by Mr. Oppenheim, because a valid search warrant empowered Oppenheim to search plaintiff. I had no personal participation in the search conducted by Mr. Oppenheim, because I was engaged and before the grand jury, specifically, the examination of Tracy Baker, when Special Master Oppenheim searched plaintiff. In addition, I did not supervise Mr.

Oppenheim's search of plaintiff, because I was before the grand jury when Mr. Oppenheim conducted his search.

10. On March 21, 1994, plaintiff was also searched by Detective Leslie Zoeller for a few minutes. I was present for part of the search conducted by Zoeller and I believe Carol Najera was present as well. Tracy Baker had access to plaintiff immediately before and after the search conducted by Zoeller, because she was not before the grand jury when Zoeller's search began.

I declare all the foregoing to be true and correct under penalty of perjury.

Executed this 28th day of August, 1995 at Los Angeles, California.

/s/ David Conn
DAVID CONN

DECLARATION OF KEVIN C. BRAZILE

I, KEVIN C. BRAZILE, do declare as follows:

1. If called as a witness I could and would competently testify to all of the facts and information contained herein based upon my own first-hand personal knowledge.

2. I am an attorney at law duly licensed and practicing before all of the Courts of the State of California and I am a member of the Los Angeles County Counsels Office, which is the attorney of record for defendants David Conn and Carol Najera in this action.

3. Exhibit "3" contains true and correct copies of excerpts from the deposition transcript of Paul Gabbert and Exhibit "5" contains true and correct copies of excerpts from the deposition transcript of Tracy Baker.

4. Exhibit "2" is a true and correct copy of the entire grand jury testimony of Tracy Baker, and proceeding before the grand jury on March 21, 1994.

5. Exhibit "4" is a true and correct copy of the grand jury bailiff's log for March 21, 1994.

I declare all the foregoing to be true and correct under penalty of perjury.

Executed this 30 day of August, 1995, at Los Angeles, California.

/s/ Kevin C. Brazile
KEVIN C. BRAZILE

DECLARATION OF CAROL NAJERA

If called as a witness I could and would competently testify to all of the facts and information contained herein based upon my own, first-hand, personal knowledge.

1. I am an attorney at law duly licensed and practicing before all of the Courts of the state of California, and I am a Deputy District Attorney with the Los Angeles County District Attorneys Office. I have been employed with the District Attorneys office since 198 , and on March 21, 1994, I was one (1) of two (2) deputy district

attorneys assigned as the prosecutors on the case entitled *People v Eric and Lyle Menendez*.

2. On March 21, 1994, I appeared before the Los Angeles County Grand Jury to question and examine Tracy Baker. Ms. Baker was subpoenaed to appear before the grand jury for investigative purposes only regarding a possible perjury committed by her during the first Menendez murder trial. The grand jury testimony of Ms. Baker began at 10:54 a.m. and was completed at 11:12 a.m. I was in the grand jury hearing room the entire time that Ms. Baker testified before the grand jury, and pursuant to California state law, her attorney remained outside of the grand jury hearing room at all times while she testified.

3. When David Conn gave an opening statement to the grand jury before any witness testified, I was present in the grand jury hearing room. I was also present in the grand jury hearing room, when the first witness, Beverly Hills Police Department detective Leslie Zoeller, testified. The examination of Detective Zoeller was done by me, but Mr. Conn was present as well. After the testimony of Detective Zoeller, which began at 10:26 a.m. and ended at 10:54 a.m., Tracy Baker was called before the grand jury.

4. When Tracy Baker appeared before the grand jury I believed that her attorney, Paul Gabbert, was outside of the hearing room, but nearby, because by law a witness who testifies before the grand jury is not allowed to have counsel present in the grand jury hearing room. When Tracy Baker was asked by me during the grand jury proceeding, "Miss Baker, are you acquainted with the Defendant Lyle Menendez," she responded that she

wasn't able to speak with her attorney because he was with the Special Master. Consequently, plaintiff was given permission to exit the grand jury room to confer with her attorney.

5. Pursuant to her request, Ms. Baker exited the grand jury room and returned a few minutes later. I did not do anything to prevent Ms. Baker from leaving the grand jury room to consult her attorney and while she was away I did not interfere or hinder her in consulting with her attorney. Upon her return to the grand jury hearing room Ms. Baker was asked, once again, "are you acquainted with the defendant Lyle Menendez." In response she replied, "Based on the advice of my counsel, I respectfully decline to answer the question because my answer might tend to incriminate me." In light of the foregoing response, I believed that Ms. Baker had conferred with her attorney after she had left the grand jury proceeding, pursuant to her request; and that her attorney, plaintiff Paul Gabbert, had advised her to assert her Fifth Amendment privilege not to incriminate herself.

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8. During Ms. Baker's grand jury testimony she requested on three (3) separate occasions to confer with her attorney. all three (3) of her requests to confer with her attorney were granted and I believed she conferred with her attorney on each occasion because on two (2) occasions she asserted her fifth amendment privilege on, "the advice of counsel," and she never indicated or stated in any manner that she did not confer with her attorney when she was given permission to consult with him. Each time Ms. Baker requested to consult her attorney I did not do anything to prevent either of them from having access to one another. I did not say anything or do anything to prevent plaintiff from giving his client legal advice at any time. Moreover, each time Ms. Baker left the grand jury proceeding to confer with her attorney I remained either in the grand jury hearing room or away from her and plaintiff.

9. On March 21, 1994, a search warrant was issued for plaintiff that authorized Special Master Elliott

Oppenheim to conduct a search of plaintiff. I did not order or direct the search of plaintiff by Mr. Oppenheim, because a valid search warrant empowered Oppenheim to search plaintiff. I had no personal participation in the search conducted by Mr. Oppenheim. In addition, I did not supervise Mr. Oppenheim's search of plaintiff.

10. On March 21, 1994, plaintiff was also searched by Detective Leslie Zoeller for a few minutes. I was present during the search conducted by Zoeller. Tracy Baker had access to plaintiff immediately before and after the search conducted by Zoeller, because she was not before the grand jury when Zoeller's search began.

I declare all the foregoing to be true and correct under penalty of perjury.

Executed this 28th day of August, 1995 at Los Angeles, California.

/s/ Carol Najera
CAROL NAJERA

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 S. ROBERT AMBROSE, Assistant County Counsel
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 500 West Temple Street
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Attorneys for Defendant(s)
 COUNTY OF LOS ANGELES, et al.,

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NUMBER
Plaintiff(s))	
vs.	)	CV 94-4227-RSWL (Ex)
)	
DAVID CONN, CAROL	)	PROOF OF SERVICE
NAJERA, ELLIOT)	
OPPENHEIM, LESLIE	)	ACKNOWLEDGEMENT
ZOELLER and DOES 1	)	OF SERVICE
through X.)	
Defendant(s))	

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the above-entitled cause.

On August 31, 1995, 1995 I served a true copy of:

XXXX DEFENDANTS CONN AND NAJERA'S DECLARATIONS AND EXHIBITS IN SUPPORT OF

THEIR MOTION FOR SUMAMRY [sic] JUDGMENT

By personally delivering it to person(s) indicated below in the manner as provided in F.R.C.P. 5(b)

XXXX By depositing it in the United States Mail, in a sealed envelope with the postage fully prepaid and addressed to the following:

Melissa N. Widdifield	Scott D. MacLatchie
Talcott, Lightfoot,	Franscell, Strickland,
Vandavelde, Woehrle	Roberts & Lawrence
& Sadowsky	225 S. Lake Ave. Penthouse
655 South Hope Street,	Pasadena, Ca. 91101
13th Fl.	
Los Angeles, Ca. 90017	

Place of mailing: 500 W. Temple Street, Los Angeles, California 90012.

Executed on August 31, 1995, 1995, at Los Angeles, California.

/s/ Barbara J. Holmes
 BARBARA J. HOLMES

EXHIBIT 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Paul L. Gabbert)	
Plaintiff,)	
vs.	)	CV 94-4227-RSWL (Ex)
David Conn, Carol Najera,)	
Elliot Oppenheim, Leslie)	
Zoeller and Does 1 through	)	ORDER
through X	)	(Filed Sep. 30, 1994)
Defendants)	
_____)	

Two of the defendants in the above captioned action, David Conn and Carol Najera, have moved to dismiss Plaintiff Paul L. Gabbert's 42 U.S.C. § 1983 suit. Defendants Conn and Najera base their Fed. R. Civ. P. 12(b)(6) motion to dismiss on, alternatively: absolute immunity; qualified immunity; and lack of causation. The matter was set for oral argument on September 19, 1994, but was removed from the Court's law and motions calendar pursuant to Fed. R. Civ. P. 78, for disposition based on the papers filed.

Now, having carefully considered all of the papers filed in support of and in opposition to the motion, the Court hereby **GRANTS** in part and **DENIES** in part Defendants' Motion to Dismiss.

I. BACKGROUND

Plaintiff Gabbert is counsel for Tracy Baker, a witness in the recent Menendez brothers murder trial. In March of 1994, Baker was being investigated by the Los Angeles District Attorney's office for perjury during the Menendez trial. Baker was called to testify before a grand jury on this issue.

At the Beverly Hills courthouse on March 21, 1994, as Plaintiff escorted his client to the grand jury hearing, Plaintiff was served with a search warrant by Detective Leslie Zoeller.¹ While Baker testified before the grand jury, Plaintiff's person, briefcase, and accordion file were searched by Special Master Elliot Oppenheim.² Immediately after Oppenheim's search of Plaintiff, Plaintiff was searched again by Detective Zoeller. District attorneys David Conn and Carol Najera, the moving parties in this motion, were present during this second search of Plaintiff.

Plaintiff alleges that the search warrant was obtained illegally, that the material searched was protected by the attorney-client privilege, and that the search went beyond the scope of the warrant. Plaintiff has filed suit under 42

¹ Leslie Zoeller is another defendant in this action but is not a party to this motion to dismiss.

² Oppenheim conducted the first search as a "special master" pursuant to Cal. Penal Code § 1524(c)(1) which requires the appointment of a special master when a search warrant is issued for documentary evidence in the possession of a lawyer. Oppenheim is another defendant in this action, but is not a party to this motion to dismiss.

U.S.C. § 1983,³ claiming constitutional violations including the sixth amendment right to counsel, fourth amendment, and substantive due process violations.

II. DISCUSSION

A. Standard for Dismissal Under Fed. R. Civ. P. 12(b)(6).

In a Rule 12(b)(6) motion to dismiss, the Court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the non-moving party. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987); *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981). A court need not, however, accept conclusory allegations or unreasonable inferences at face value. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), cert. denied 454 U.S. 1031, 102 S. Ct. 567 (1981). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80

³ 42 U.S.C. § 1983 provides that

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(1957); see also, *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

In deciding on a Rule 12(b)(6) motion to dismiss, the court generally may not consider material beyond the pleadings. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994). However, material which is properly submitted as part of the complaint may be considered, and documents whose contents are alleged in a complaint, and whose authenticity is not questioned may also be considered, even if the material is not physically attached to the complaint. *Id.* at 454.

B. Defendants Conn and Najera's First Ground For Dismissal: Absolute Immunity as Prosecutors.

Defendants first move that Plaintiff's § 1983 suit be dismissed against them on the grounds that, as prosecutors, they have absolute immunity from suit under § 1983.

The government official seeking absolute immunity bears the burden of showing that such immunity is justified for the action at issue. *Burns v. Reed*, ___ U.S. ___, 111 S. Ct. 1934, 1939 (1991). There is a presumption that qualified rather than absolute immunity is generally sufficient to protect government officials. *Id.* Absolute immunity is given sparingly. *Id.*

Prosecutors are entitled to absolute immunity from suit under § 1983 for conduct "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 411, 431, 96 S. Ct. 984, 995 (1976). In determining a prosecutor's immunity, the court looks at

the function performed by the prosecutor, rather than the prosecutor's status as prosecutor.

Prosecutorial activities in initiating and pursuing prosecution are "functions to which the reasons for absolute immunity apply with full force," and prosecutors are entitled to absolute immunity when performing those functions. *Id.* However, prosecutors are not protected by absolute immunity when they act as police investigators rather than as advocates preparing for trial. *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S. Ct. 2606, 2616 (1993). In other words, when a prosecutor performs functions generally performed by detectives or police officers, he receives the immunity usually accorded those actions - i.e., qualified, not absolute immunity.

In order for Defendants to prevail on their claim for absolute immunity, they must show that they were functioning as advocates rather than as investigators. The *Buckley* Court found that a prosecutor cannot be acting as an advocate unless, as a threshold question, he has probable cause to initiate judicial proceedings. Even after a determination of probable cause, the prosecutor who engages in police investigative work receives only qualified immunity. 113 S. Ct. at 2616 & n.5. The question is not whether the conduct is related to the decision of whether to prosecute, but "whether the prosecutor's actions are closely associated with the judicial process." *Burns*, 111 S. Ct. at 1944.

Plaintiff argues that Defendants acted as police investigators, rather than advocates, because the "single purpose of the defendants' conduct was to gather evidence." *Opp.* at 12. Defendants' purpose, however, is not the

issue here, in that it is possible for prosecutors to be granted absolute immunity for investigative functions which are connected to their role as advocates. *Imbler*, 424 U.S. at 432, 96 S. Ct. at 995 n.33 (noting that the prosecutor's role as advocate involves conduct preliminary to the initiation of prosecution, including other actions outside the courtroom).

Rather, the issue is Defendants' function during those investigations. Preparation for actions undertaken as an advocate may require investigative and administrative conduct which is shielded as connected to the prosecutor's role as advocate. *Id.* As the Supreme Court has stated, "Drawing a proper line between these functions may present difficult questions." *Id.* Similarly, Plaintiff's assertion that Defendants were engaging in "quintessentially investigative conduct" begs the question of what role Defendants acted in while they were engaging in that conduct.

Plaintiff alleges that Defendants' Conn and Najera delayed Plaintiff at the courthouse under the pretext of supplying Plaintiff with a letter granting his client immunity, until Plaintiff was served with the search warrant. Plaintiff further alleges that Conn and Najera were present when Plaintiff was served with the search warrant, and that Conn introduced Plaintiff to Special Master Oppenheim, who conducted the first search. Lastly, Plaintiff alleges that Conn and Najera were present for the second search and viewed Plaintiff's documents during the search, after Conn informed Plaintiff that Special Master Oppenheim had determined nothing in the briefcase and files was privileged.

Taking all of the above allegations as true, and making all inferences in favor of the non-moving party as is required on a 12(b)(6) motion, the Court finds that the conduct of Defendants Conn and Najera constitutes participation in the investigations. Further, the Court finds that these investigations were not connected to Defendants' role as advocates, but, rather, were pre-indictment evidence-gathering more associated with police functions. For those reasons, the Court **DENIES** Defendants Conn and Najera's claim to absolute immunity.

C. Defendants' Second Claim: Qualified Immunity as Government Officials.

Alternatively, Defendants Conn and Najera move for dismissal of Plaintiff's § 1983 action on the basis of their qualified immunity as government officials. Qualified immunity shields government officials from suit for damages when they perform discretionary functions, and their conduct does not violate clearly established statutory or constitutional rights of which a reasonable official would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). The Ninth Circuit has set out a three prong inquiry for determining qualified immunity: identification of the specific right allegedly violated; determining whether it was so "clearly established" as to alert reasonable officers; and determining the ultimate issue of whether a reasonable officer could have believed the particular conduct was lawful. *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). Because this immunity is an immunity from suit, rather than merely a defense to liability, the Supreme Court has stressed the

importance of resolving immunity questions as early as possible in litigation. *Hunter v. Bryant*, ___ U.S. ___, 112 S. Ct. 534 (1991).

1. Plaintiff's Conduct was Discretionary.

In general, only discretionary conduct by government officials is entitled to qualified immunity. *Harlow*, 457 U.S. at 816, 102 S. Ct. at 2737. Plaintiff contends that Defendants are not entitled to qualified immunity because their conduct in searching him was not discretionary. He contends that the Defendants' alleged supervision and participation in the search of Plaintiff was conduct governed by Cal. Penal Code § 1524(c)(2), which provides for special procedures when a search warrant is issued for documentary evidence in possession of an attorney. Plaintiff argues that, because Cal. Penal Code § 1524 is mandatory, Defendants' conduct was ministerial rather than discretionary and thus outside the scope of behavior protected by qualified immunity.

In order for Plaintiff to state a claim under 42 U.S.C. § 1983, Plaintiff must plead a violation of constitutional or federal law. Plaintiff contends this alleged violation of the state statute resulted in the deprivation of his constitutional rights. However, Plaintiff does not specify the constitutional deprivations to which the alleged violation of Cal. Penal Code § 1524 gives rise.

State law cannot be the basis for a § 1983 claim, unless the violation of the state law also results in a constitutional or federal law violation. *Long v. Norris*, 929 F.2d 1111, 1115 (6th Cir. 1991) (noting that "although

Tennessee prison regulations may create a constitutional entitlement under the due process clause of the fourteenth amendment, they cannot change the standard of analysis for constitutional issues arising under the fourth amendment"). Thus, Plaintiff's argument that Defendants have no qualified immunity on the grounds that they acted ministerially does not succeed, because he fails to state a § 1983 claim on that basis. The Court finds that Defendants' conduct was discretionary.

2. Whether Defendants Violated Clearly Established Law.

The real issue in determining whether Defendants should be entitled to qualified immunity is whether the law governing their conduct was clearly established so that a reasonable officer would have known the conduct was unlawful. *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738. The threshold determination of whether the governing law was clearly established is a matter of law for the court to decide. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993) (citing *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738). However, where material issues of fact are in dispute, the case must proceed to trial. *Id.* at 873.

a. Whether Defendants Were the Cause of the Alleged Deprivations.

Plaintiff alleges numerous constitutional violations. The first issue to be determined, however, is whether Defendants were sufficiently involved in the alleged

unconstitutional conduct to be liable under § 1983. Essentially, Plaintiff alleges that Defendants proximately caused the alleged constitutional violations in two ways: a) they directed or supervised others in the unconstitutional behavior; and b) they directly participated in the second search.

i. Vicarious Liability Not a Basis for a § 1983 Claim

Vicarious liability is not a basis for a § 1983 claim. *Monell v. Dep't. of Soc. Serv.*, 436 U.S. 658, 692, 98 S. Ct. 2018, 2036-37 (1978). However, supervision or direct participation in the unlawful conduct is a basis for liability under § 1983. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

ii. Causation Must Be Proximate.

Section 1983 further requires that a defendant's supervision or participation in the allegedly unconstitutional conduct must be the proximate cause of the deprivation. *Arnold v. Intern. Business Machines*, 637 F.2d 1350, 1355 (9th Cir. 1981).

Defendants contend that Plaintiff has failed to allege any direct participation or supervision on the part of Defendants Conn and Najera. They further contend that Plaintiff fails to show that any supervision or participation by Defendants caused the alleged deprivation of Plaintiff's constitutional rights.

Plaintiff's complaint alleges that Conn directed the search of Plaintiff at the courthouse on March 21, 1994 by

Special Master Oppenheim, as well as the search by Detective Zoeller, and states that Najera and Conn were not only present at the search but also "viewed" documents which were searched. It seems clear that Plaintiff's allegations, taken as true, do state facts showing direction and participation by Defendants. Moreover, it is apparent that such direction and participation would be considered a proximate cause of the constitutional deprivations which Plaintiff alleges. Defendants' lack of causation defense thus fails.

b. Alleged Constitutional Violations.

Plaintiff alleges a number of constitutional deprivations caused by Defendants, including substantive due process, fourth amendment, sixth amendment, and fourteenth amendment deprivations.

i. Fourth Amendment Violations.

a. Invalid Warrant.

Plaintiff alleges that Defendants Conn and Najera deprived him of his fourth amendment right, as incorporated through the fourteenth amendment, to be secure from unreasonable searches by conducting a search under an invalid warrant. The warrant is invalid, Plaintiff alleges, because it contains two material misstatements of fact made with the knowledge they were false. Under *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684-85 (1978), allegations of deliberate misstatements made by the affiant to a warrant entitle the defendant to

an evidentiary hearing on the validity of the warrant. The *Franks* standard also defines the scope of qualified immunity in civil rights actions. *Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th Cir. 1991) (*Branch I*) (citing *Rivera v. United States*, 928 F.2d 592, 604 (2d Cir. 1991)). However, Plaintiff does not allege that the actual affiant, Detective Zoeller, made the statements with the knowledge of their falsity, or with reckless disregard of the truth, as *Franks* requires. 438 U.S. at 171, 98 S. Ct. at 2684.

Additionally, Defendants respond that, even if the false statements were made intentionally or in reckless disregard of the truth, there is sufficient other material in the affidavit to support a finding of probable cause, which under *Franks* excuses the inaccuracies. *Id.* at 171-72, 98 S. Ct. at 2684. Defendants point to the affidavit as containing a statement from Plaintiff's client that the primary object of the search warrant, the alleged letter, had been turned over to Plaintiff.⁴ The affidavit states that Tracy Baker, Plaintiff's client, had informed the affiant that she had turned over the Menendez correspondence to her attorney, Plaintiff. This statement would be enough to support the issuing of the search warrant against Plaintiff Gabbert, even without the allegedly false statements.

Thus, the warrant is valid under either of Plaintiff's arguments, and the search conducted pursuant to it is

⁴ The affidavit and search warrant were attached to Plaintiff's complaint. Material such as subpoenas and search warrants attached as exhibits to plaintiff's complaint may properly be considered on a motion to dismiss. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) (*Branch II*).

likewise valid. The search was not clearly unlawful on the grounds of an invalid warrant, and under *Harlow*, Conn and Najera are entitled to qualified immunity on the charge that the search under the allegedly invalid warrant violated Plaintiff's fourth amendment rights.

b. Impermissibly Broad Execution of Warrant.

Secondly, Plaintiff alleges that Oppenheim's first search violated the fourth amendment because the search went beyond the scope of the warrant.⁵ He further alleges that the second search was invalid because it was "repetitive."

The warrant authorized a search of Plaintiff for "any and all correspondence between Tracy Baker and Lyle Menendez." (Complaint, Ex. C.). Plaintiff alleges that Oppenheim's search of Plaintiff's eyeglass case, memorandum calendar, and wallet/pocketbook went beyond the scope of the warrant because such correspondence would not reasonably be expected to be within those objects.

Police may search all items which legitimately might contain the objects specified in the warrant. *United States v. Grandstaff*, 813 F.2d 1353, 1358 (9th Cir. 1987); *United States v. Disla*, 805 F.2d 1340, 1347 (9th Cir. 1986). The

⁵ The following discussion of Oppenheim's search assumes, without determining, that Defendants Conn and Najera directed that search and thus were a cause of the alleged constitutional deprivation.

warrant in question was for "correspondence." By definition, correspondence may include letters and notes on small pieces of paper. Such small pieces of paper might have been placed within Plaintiff's eyeglass case, wallet, or calendar. The search of Plaintiff therefore did not go beyond the scope of the warrant and thus was not a violation of the fourth amendment on those grounds. On these grounds, Plaintiff cannot show that the search was clearly unlawful so as to overcome Defendants' claim to qualified immunity under *Harlow*.

Plaintiff further alleges that the second search of his personal effects was unauthorized by the warrant because it was "repetitive" and thus violated his rights under the fourth amendment. Plaintiff cites no case law to support his proposition that such searches are unreasonable. On the contrary, courts have allowed "second" searches under the same warrant, as long as the subsequent search could be considered a continuation of the first search. *United States v. Kaplan*, 895 F.2d 618, 623 (9th Cir. 1990) (holding that officer who visited defendant's offices to obtain specific files was allowed to return several hours later; second entry was considered continuation of the search); *United States v. Carter*, 854 F.2d 1102, 1107 (8th Cir. 1988) (officer's return to a motel room, several hours after a search, was valid because the authority of the search warrant had not expired).

The second search conducted by Zoeller on Plaintiff occurred soon after the first search conducted by Oppenheim, and thus would be considered a continuation of Oppenheim's search under *Kaplan*. In any event, the second search was not clearly unlawful so that a reasonable officer should have known it was illegal. The

second search, like the first search, therefore does not meet the *Harlow* test for overcoming qualified immunity.

c. Violation of Cal. Penal Code § 1524

Plaintiff alleges that the search was unconstitutional on a third ground, because it was allegedly conducted in violation of Cal. Penal Code § 1524, as discussed above in section II.C.1. Again, a § 1983 claim must be premised on the violation of federal law or constitutional provision. *Long v. Norris*, 929 F.2d at 1114. The violation of Cal. Penal Code § 1524 in and of itself does not constitute a fourth amendment violation, nor does Plaintiff clearly allege that his substantive due process rights were violated by the alleged violation of the state statute. Officials sued for constitutional violations do not lose their qualified immunity in § 1983 actions merely because their conduct violates some state statutory or administrative provision. *Davis v. Scherer*, 468 U.S. 183, 194, 104 S. Ct. 3012, 3019 & n.12 (1984). The violating conduct must violate clearly established federal law. *Elder v. Holloway*, ___ U.S. ___, 114 S. Ct. 1019, 1023 (1994) (unanimous decision).

Even if Plaintiff alleged that Defendants' failure to follow the procedural requirements of Cal. Penal Code § 1524 constituted a fourteenth amendment deprivation, his claim would fail. While state law may create a property interest protected by the fourteenth amendment, a substantive property right cannot exist exclusively by virtue of a procedural right. *Dorr v. County of Butte*, 795 F.2d 875, 876, 877 (9th Cir. 1986).

ii. Intrusion into Client Relationships as a Sixth Amendment Violation

Plaintiff alleges that Defendants, by causing the search warrant to be served upon him and participating in the search, rendered him incommunicado from his client who was simultaneously testifying before the grand jury, thereby violating his client's sixth amendment right to effective counsel.

a. Plaintiff's Standing to Raise His Client's Sixth Amendment Claim

Plaintiff has standing to assert his client Baker's sixth amendment claims⁶ under *Wounded Knee Legal Defense/Offense Com. v. FBI*, 507 F.2d 1281, 1284 (8th Cir. 1974) ("[A] lawyer has standing to challenge any act which interferes with his professional obligation to his client and thereby, through the lawyer, invades the client's constitutional right to counsel."); *Keker v. Procunier*, 398 F. Supp. 756, 765 (E.D. Cal. 1975) (counsel forced to meet their imprisoned clients in poor conditions had standing to raise their clients' sixth amendment claims).

⁶ The record does not state whether or not Baker is actually a defendant in a criminal proceeding, although it appears that she was the object of a grand jury investigation. A violation of the attorney-client privilege implicates the sixth amendment only when it applies to the relationship between a criminal defendant and his attorney. *Partington v. Gedan*, 961 F.2d 852, 863 (9th Cir. 1992).

b. Interference with Attorney-Client Relationship and Prevention of Effective Counsel as a Sixth Amendment Violation

The question here is whether, for purposes of the *Harlow* test for qualified immunity, the law governing Defendants' behavior in searching Plaintiff and arguably interfering with his client's sixth amendment right to counsel was clearly established.

Plaintiff alleges that the serving of the search warrant upon him just as his client was called to testify in front of the grand jury was an interference with his client's sixth amendment right to effective assistance of counsel. Because of the serving of the search warrant and Oppenheim's subsequent search of Plaintiff, Plaintiff claims that his client was prevented from consulting with him immediately before and during her grand jury testimony. Plaintiff argues that this constitutes a violation of the Sixth Amendment.

Leaving aside the causation question of whether Defendants Conn and Najera were actually involved in timing the service of the search warrant to interfere with Plaintiff's representation of his client, the issue is whether such alleged interference is a violation of Baker's sixth amendment right to effective counsel. Governmental interference with the attorney-client relationship will constitute a violation of the sixth amendment only if the interference substantially prejudices the defendant. *United States v. Irwin*, 612 F.2d 1182, 1186-1187 (9th Cir. 1980); see *United States v. Glover*, 596 F.2d 857, 863-64 (9th

Cir. 1979). Plaintiff makes no allegation that his client was substantially prejudiced by his unavailability. For that reason, the law is not clearly established that Defendants' alleged interference⁷ with Plaintiff's representation of his client was unlawful. Under *Harlow*, Defendants Conn and Najera are thus entitled to qualified immunity on this issue.

c. Defendant's Contact of Plaintiff's Client as a Violation of Sixth Amendment

Plaintiff further alleges that Defendants Conn and Najera violated his client's sixth amendment rights by questioning her during a search of her home on March 18, 1994, despite knowing that she was represented by counsel, in violation of Cal. Prof. R. Conduct 2-100 (West Supp. 1994). Cal. Prof. R. Conduct 2-100 (A) provides that

While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

This rule has been found to apply to prosecutors pursuing a criminal case. *United States v. Lopez*, 4 F.3d 1455, 1459 (9th Cir. 1993). However, while Defendants Conn and Najera are bound by this rule and allegedly may

⁷ Again, the Court assumes without determining that causation exists, even though Defendants Conn and Najera's causation of the alleged interference is far from clear.

have violated it, Plaintiff does not allege that this violation "substantially prejudiced" his client so that, under *United States v. Irwin*, his client's sixth amendment rights have been violated. Further, as discussed above, violations of state law do not provide a claim under § 1983 unless the violations in some way implicate a violation of constitutional rights.

d. Invasion of Attorney-Client Privilege.

Plaintiff alleges that the search of his briefcase and files invaded the attorney-client privilege because privileged documents were viewed during the searches, and that his clients' sixth amendment rights were violated as a result. Plaintiff's allegations again fail to state a clearly established constitutional violation.⁸ "[S]tanding alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right." *Partington v. Gedan*, 961 F.2d 852, 863 (9th Cir. 1992) (quoting *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985)). Unless the interference with the attorney-client privilege substantially prejudices the defendant, an intrusion on the confidential relationship between a defendant and his attorney does not constitute a sixth amendment violation.

⁸ Plaintiff alleges that not only Baker's files but other clients' files were viewed during this search. Plaintiff's clients whose files were viewed may have a privacy interest in the files, but Plaintiff does not have standing to raise his clients' fourth amendment claims. *DeMassa v. Nunez*, 770 F.2d 1505, 1506, 1507 (9th Cir. 1985).

Partington, 961 F.2d at 863; *Clutchette*, 770 F.2d at 1471 (citing *United States v. Irwin*).

Thus, case law does not establish that Defendants' conduct was clearly a violation of the sixth amendment. Again, Plaintiff fails to allege that his client was substantially prejudiced by Defendant's alleged interference with the attorney-client privilege. Thus, under *Harlow*, Defendants have a qualified immunity to Plaintiff's claim.

iii. Plaintiff's Fourteenth Amendment Right to Practice His Profession

Plaintiff alleges that Defendants' conduct interfered with his fourteenth amendment interest in practicing his profession. Such a right has been found to exist. *Keker v. Procunier* [sic], 398 at 756; see *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972). At least one district court has found that prison officials impermissibly interfered with attorneys' fourteenth amendment rights when attorneys were forced to meet their clients in an overly warm interview room in which glass partitions hampered attorneys' ability to consult with their clients. *Kecker* [sic], 398 F. Supp. at 761.

To show that a right allegedly violated is "clearly established by law" under the *Harlow* test,

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held

unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 3039 (1987) (citations omitted).

Defendants' alleged plan to serve the search warrant upon Plaintiff as his client began testifying before the grand jury is arguably an interference with Plaintiff's fourteenth amendment right to practice his profession. Plaintiff contends that as a result of the serving of the search warrant and the subsequent search, he was prevented from advising his client immediately before and during the grand jury hearing, when his client specifically twice sought to consult with him. Additionally, when Plaintiff stated that his client's appearance needed to be delayed during his search, his client was instead ordered to immediately appear in front of the grand jury.

Viewing the evidence most favorably for Plaintiff on this motion to dismiss, the Court finds that Defendants did violate Plaintiff's clearly established fourteenth amendment right to practice his profession free from undue governmental interference. The Court thus DENIES Plaintiff's motion to dismiss this claim.

c. Substantive Due Process "Shocks the Conscience" Claim.

Lastly, Plaintiff claims that Defendants' conduct is so egregious that it "shocks the conscience" and violates substantive due process notions of decency and fairness. This "shock the conscience" test was first expressed in *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209

(1952), where police officers in search of evidence forcibly pumped the stomach of a criminal suspect. This type of substantive due process claim has most often been invoked in relation to police brutality and unwanted body manipulation, but has also been applied to relentless questioning of a suspect. *Cooper v. Dupnik*, 963 F.2d 1220, 1249, 1250 (9th Cir. 1992).

The Supreme Court has not set out specific standards for the test. *Id.* The Court finds here that Defendants' alleged conduct was not so lacking indecency and fairness that their actions violated Plaintiff's substantive due process right. Thus, Defendants have qualified immunity for Plaintiff's substantive due process claim.

D. Qualified Immunity No Defense to Injunctive Relief

Qualified immunity is not a defense to a claim for injunctive relief. *American Fire v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991). Plaintiff petitions for both damages and injunctive relief. As discussed above, Plaintiff's claim for damages should be dismissed on the grounds that Defendants have qualified immunity which protects them from civil suits for damages, but Plaintiff's claim for injunctive relief is more appropriately considered on a motion for summary adjudication.

E. Leave to Amend Complaint

Fed. R. Civ. P. 15(a) states that leave to amend pleadings "shall be freely given when justice so requires." However, leave may be denied when amendment would

cause undue delay, would be made in bad faith, would be futile, or would cause prejudice to the opposing party. *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973). Leave to amend need not be granted if the court determines that allegation of other facts consistent with the challenged pleading could not correct the deficiency. *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988); *Schreiber Dist. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

In this case, the Court determines that it would be futile to grant Plaintiff leave to amend his pleadings in regard to his First Claim for damages, which alleges fourth amendment violations, and his Second Claim for damages, subsections (c) (alleged violation of fourth and fourteenth amendments based on Cal. Penal Code § 1524) (e) (alleged violation of sixth and fourteenth amendment based on Cal. R. Prof. Conduct 2-100), and (f) (alleged violation of attorney-client privilege). The Court thus dismisses those claims without leave to amend.

IV. CONCLUSION

Defendants Conn and Najera's Rule 12(b)(6) motion to dismiss is hereby **DENIED** as to subsection (d) of Plaintiff's Second Claim for the violation of his fourteenth amendment right to practice his profession, and as to Plaintiff's claims for injunctive and declaratory relief. Defendants' Rule 12(b)(6) motion to dismiss is hereby **GRANTED** on the basis of qualified immunity as to Plaintiff's remaining claims for damages against Defendants Conn and Najera. Plaintiff's claims for fourth amendment violations, violations of the attorney-client

privilege, violations of Cal. Rule Prof. Conduct 2-100, and violations of Cal. Penal Code § 1524 are **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

RONALD S W LEW
RONALD S.W. LEW
 United States District Judge

DATED: September 27, 1994

CV 94-4227-RSWL *Gabbert v. Conn, Najera et al.*, Defendants Conn and Najera' 12(b)(6) motion to dismiss.

(Gabbert1.order\J)

EXHIBIT 2

THE GRAND JURY OF THE
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

IN RE THE GRAND JURY	)	CASE NO. (NONE)
INVESTIGATION)	
(SECRET))	
WITNESS: TRACI LE BAKER.)	
)	

REPORTER'S TRANSCRIPT OF
GRAND JURY PROCEEDINGS

MONDAY, MARCH 21, 1994

APPEARANCES:

DAVID CONN, CAROL NAJERA, DEPUTIES
DISTRICT ATTORNEY OF THE COUNTY OF
LOS ANGELES, REPRESENTING THE OFFICE
OF THE DISTRICT ATTORNEY. TERRY L.
WHITE, DEPUTY DISTRICT ATTORNEY OF
LOS ANGELES COUNTY AND LOS ANGELES
COUNTY GRAND JURY ADVISOR.

RICHARD B. COLBY, CSR 1080, DULY
APPOINTED AND SWORN AS THE OFFICIAL
STENOGRAPHIC REPORTER OF THE LOS
ANGELES COUNTY GRAND JURY.

[p. 1] LOS ANGELES, CALIFORNIA;
MONDAY, MARCH 21, 1994

10:20 A.M.

(AT THE BEGINNING OF
THESE PROCEEDINGS, 19
GRAND JURORS WERE PRESENT.)

THE FOREPERSON: THIS HEARING IS NOW
IN SESSION.

MADAME SECRETARY, WHAT IS THE STATUS OF
THE ROLL?

(ROLL CALLED.)

THE SECRETARY: LET THE RECORD
REFLECT THERE ARE NINETEEN GRAND JURORS
PRESENT THIS MORNING.

THE FOREPERSON: GOOD MORNING, MR.
COLBY. PLEASE RAISE YOUR RIGHT HAND. I WILL
NOW SWEAR IN THE COURT REPORTER.

(THE GRAND JURY COURT REPORTER,
RICHARD B. COLBY, WAS SWORN AS FOLLOWS:)

THE FOREPERSON: YOU DO SOLEMNLY
SWEAR THAT YOU WILL CORRECTLY TAKE IN
SHORTHAND AND CORRECTLY TRANSCRIBE, TO
THE BEST OF YOUR ABILITY, ALL OF THE TESTI-
MONY GIVEN BY EACH AND EVERY WITNESS TESTI-
FYING IN THE MATTER NOW PENDING BEFORE THIS
GRAND JURY, AND THAT YOU WILL KEEP SECRET
AND DIVULGE [p. 2] TO NO ONE ANY OF THE PRO-
CEEDINGS OF THIS GRAND JURY, SO HELP YOU GOD.

THE REPORTER: I DO.

THE FOREPERSON: I WILL NOW READ THE FORE STATEMENT.

(READING:)

"FOR INVESTIGATIVE PURPOSES ONLY:

"THE DISTRICT ATTORNEY'S OFFICE IS NOT SEEKING AN INDICTMENT AT THIS TIME.

"CRIMINAL INVESTIGATION.

"MATTERS TO BE CONSIDERED IN CONNECTION WITH THE INVESTIGATION:

"THE DISTRICT ATTORNEY'S OFFICE WILL BE QUESTIONING A WITNESS WHO TESTIFIED AS A DEFENSE WITNESS DURING THE MENENDEZ MURDER TRIAL.

"THIS HEARING WILL BE REGARDING POSSIBLE PERJURY COMMITTED BY THE WITNESS DURING THE AFOREMENTIONED TRIAL.

"TENTATIVE WITNESS LIST:

"TRACI BAKER.

"THE GRAND JURORS WILL PLEASE ADD TO THEIR TENTATIVE WITNESS LIST DETECTIVE LES ZOELLER FROM THE BEVERLY HILLS POLICE DEPARTMENT.

"ANY MEMBER OF THE GRAND JURY [p. 3] WHO HAS A STATE OF MIND IN REFERENCE TO THE CASE, OR TO ANY OF THE PARTIES INVOLVED, WHICH

WILL PREVENT HIM OR HER FROM ACTING IMPARTIALLY AND WITHOUT PREJUDICE TO THE SUBSTANTIAL RIGHTS OF ANY OF THE SAID PARTIES, WILL NOW RETIRE."

THE SECRETARY: LET THE RECORD REFLECT THAT NO GRAND JUROR HAS RETIRED.

THE FOREPERSON: GOOD MORNING AND WELCOME TO THE GRAND JURY, DEPUTY DISTRICT ATTORNEY DAVID CONN.

MR. CONN: GOOD MORNING.

THE FOREPERSON: ALSO, DEPUTY DISTRICT ATTORNEY CAROL NAJERA WILL BE JOINING US MOMENTARILY.

DO YOU HAVE AN OPENING STATEMENT?

MR. CONN: YES, I DO.

THE FOREPERSON: YOU MAY PROCEED.

MR. CONN: THANK YOU.

OPENING STATEMENT

BY MR. CONN:

GOOD MORNING, LADIES AND GENTLEMEN.

I'M SURE THAT ALL OF YOU ARE FAMILIAR WITH THE PROSECUTION OF PEOPLE VS. LYLE AND ERIC MENENDEZ. IT WAS A WELL-PUBLICIZED HOMICIDE PROSECUTION HERE IN THE COUNTY OF LOS ANGELES.

THE TWO DEFENDANTS IN THIS CASE WERE CHARGED WITH THE MURDER OF THEIR PARENTS, KITTY AND JOSE MENENDEZ.

THE CASE WAS TRIED RECENTLY IN LOS ANGELES [p. 4] SUPERIOR COURT AND IT RESULTED IN A HUNG JURY. THE CASE IS CURRENTLY AWAITING RETRIAL AT THIS TIME.

BOTH DEFENDANTS ARE CHARGED WITH TWO COUNTS OF FIRST DEGREE MURDER WITH SPECIAL CIRCUMSTANCES, WHICH MAKES THEM ELIGIBLE FOR THE DEATH PENALTY.

THEY ARE ALSO CHARGED WITH THE CRIME OF CONSPIRACY TO COMMIT MURDER.

THE JURY IN THAT CASE HUNG AS TO ALL THREE COUNTS; THAT IS, THEY WERE UNABLE TO AGREE AS TO ALL THREE COUNTS.

IT WAS THE CONTENTION OF THE PROSECUTION IN THAT CASE THAT THE DEFENSE PRESENTED BY THE DEFENDANTS WAS UNRELIABLE AND WAS, IN FACT, CONTRIVED.

THE DEFENSE IN THAT CASE ESSENTIALLY WAS A DEFENSE THAT THE DEFENDANTS HAD BEEN ABUSED BY THEIR PARENTS FOR A NUMBER OF YEARS AND THAT THIS ABUSE RESULTED IN THE DEFENDANTS KILLING THEIR PARENTS.

IT WAS NOT ARGUED THAT THE DEFENDANTS WERE NOT GUILTY AS A RESULT OF THEIR CONDUCT.

NOT GUILTY WAS NOT AN OPTION.

THE SOLE CONSIDERATION BEFORE THE JURYS IN THAT CASE - THEY DID HAVE TWO SEPARATE JURYS - WAS THE QUESTION OF WHAT DEGREE OF HOMICIDE THE DEFENDANTS SHOULD BE FOUND GUILTY OF.

THE THREE OPTIONS THAT WERE BEFORE THE JURY WAS:

FIRST DEGREE MURDER;

SECOND DEGREE MURDER; AND,

[p. 5] VOLUNTARY MANSLAUGHTER.

THE OPTION OF NOT GUILTY WAS NOT BEFORE THE JURY.

THE JURY SPLIT IN VARIOUS WAYS, SOME OPTING FOR FIRST DEGREE MURDER, SOME OPTING FOR SECOND DEGREE MURDER AND SOME OPTING FOR VOLUNTARY MANSLAUGHTER.

WHAT WE INTEND TO DO, LADIES AND GENTLEMEN, IS TO PRESENT EVIDENCE BEFORE THE GRAND JURY THAT WOULD TEND TO SHOW THAT SOME OF THE WITNESSES WHO TESTIFIED FOR THE DEFENSE TESTIFIED FALSELY.

ONE OF THE WITNESSES THAT WE WILL BE PRESENTING TODAY IS A WOMAN BY THE NAME OF TRACI BAKER.

THE DEFENSE IN THE MENENDEZ CASE WAS THAT YEARS OF ABUSE HAD LED TO THE HOMICIDE.

AND ONE OF THE AREAS, ONE OF THE INCIDENTS WHICH WAS USED BY THE DEFENSE TO PRESENT THIS ABUSE TO THE JURY WAS AN INCIDENT IN WHICH KITTY MENENDEZ ALLEGEDLY TRIED TO POISON HER FAMILY.

THAT WAS USED AS A MATERIAL PART OF THEIR CASE TO ESTABLISH THAT KITTY MENENDEZ WAS AN UNSTABLE WOMAN AND, THAT AS A RESULT, SHE WAS LIKELY TO KILL HER SONS OR AT LEAST PARTICIPATE IN THE KILLING OF HER SONS BY HER HUSBAND, JOSE MENENDEZ.

TO ESTABLISH THAT INCIDENT, THE DEFENSE CALLED A WITNESS BY THE NAME OF TRACI BAKER.

TRACI BAKER TESTIFIED BEFORE THE JURY UNDER OATH, AND WHAT SHE SAID WAS THAT SHE RECALLS AN INCIDENT IN WHICH SHE WAS AT THE MENENDEZ HOME, WHICH SHE RELATED TO [p. 6] THE JURY.

SHE SAID THAT SHE IS A FRIEND OF LYLE AND ERIC MENENDEZ; THAT SHE HAD A RELATIONSHIP, A CLOSE PERSONAL RELATIONSHIP WITH LYLE MENENDEZ, AND, AS A RESULT OF THAT RELATIONSHIP, SHE SPENT A SUBSTANTIAL AMOUNT OF TIME AT THE MENENDEZ HOME IN LATE 1988.

THE MURDER OCCURRED IN 1989.

SHE RECALLED AN INCIDENT IN WHICH SHE WAS IN THE FAMILY DINING ROOM. SHE WAS THERE WITH ERIC AND LYLE MENENDEZ AND JOSE MENENDEZ, THEIR FATHER, AND SHE RECALLS THAT

THE ONLY OTHER PERSON PRESENT WAS KITTY MENENDEZ.

KITTY MENENDEZ WAS BRINGING FOOD IN FROM THE KITCHEN TO THE TABLE.

AND SHE RECALLS THAT DURING THIS INCIDENT, JOSE MENENDEZ SUDDENLY PUSHED THE FOOD AWAY FROM THE TABLE, KNOCKING OVER VARIOUS THINGS IN FRONT OF HIM AND SAID SOMETHING TO THE EFFECT OF, "WHAT DID YOU DO TO THE FOOD?"

HE BECAME EXTREMELY ANGRY, AND AT THAT POINT HE SAID TO HIS SONS, "COME ON. WE ARE GETTING OUT OF HERE."

AT THAT POINT, HE LEFT THE TABLE AND HE SUMMONED LYLE MENENDEZ AND ERIC MENENDEZ TO FOLLOW ALONG WITH HIM, AND TRACI BAKER, IN TURN, WAS SUMMONED BY LYLE AND SHE WENT OUTSIDE.

THEY ALL MET OUTSIDE THE HOUSE AND JOSE MENENDEZ TOOK THEM TO HAMBURGER HAMLET, A NEARBY RESTAURANT, TO HAVE DINNER.

AFTER THEY GOT INTO THE CAR, SHE AND LYLE BEING IN THE BACK SEAT AND ERIC BEING IN THE FRONT SEAT WITH [p. 7] JOSE, ERIC SAID TO JOSE SOMETHING TO THE EFFECT OF, "WHAT DO YOU THINK SHE TRIED TO DO, DAD?"

AND JOSE SAID, "I DON'T KNOW. BUT I JUST DON'T TRUST HER TODAY."

THIS INCIDENT WAS ARGUED BY THE DEFENSE AS EVIDENCE OF THE FACT THAT KITTY MENENDEZ TRIED TO POISON HER FAMILY, AND IT CONTRIBUTED TO THE DEFENSE THEORY, AS I SAID, THAT SHE WAS AN UNSTABLE WOMAN.

LADIES AND GENTLEMEN, SOME TIME AFTER THE CASE WENT TO THE JURY AND THE JURY BEGAN THEIR DELIBERATIONS, THE INVESTIGATING OFFICER IN THIS CASE CAME ACROSS A LETTER. IT WAS THE FIRST TWO PAGES OF A LETTER, AND HE LATER CAME ACROSS A THIRD PAGE.

HE RECEIVED TWO PAGES FROM A WRITER BY THE NAME OF DOMINIC DUNN. IT WAS A XEROX COPY OF A LETTER. AND HE FELT THAT IF HE INTERVIEWED ANOTHER WITNESS, HE MIGHT BE ABLE TO OBTAIN MORE OF THE LETTER FROM THAT WITNESS.

SO HE WENT TO THAT WITNESS AND HE ASKED THAT WITNESS IF SHE HAD ANY PART OF THAT LETTER. AND, IN FACT, SHE INDICATED THAT SHE DID HAVE PART OF THAT LETTER. SHE HAD THREE PAGES OF THAT LETTER.

SHE PROVIDED TO THE INVESTIGATING OFFICER A XEROX COPY OF THE XEROX COPY THAT SHE HAD.

THIS LETTER, LADIES AND GENTLEMEN, WAS SUBMITTED TO A HANDWRITING EXPERT, AND THE EXPERT SAID, AFTER COMPARING THIS LETTER TO OTHER DOCUMENTS WRITTEN BY LYLE MENENDEZ, THAT THEY COULD TELL THAT THIS LETTER WAS,

IN FACT, WRITTEN BY LYLE MENENDEZ. THIS LETTER IS IN HIS [p. 8] HANDWRITING.

AND WHAT IT IS, IT IS A LETTER DATED FEBRUARY 5 TO TRACI BAKER. AND IN THIS LETTER HE PURPORTS TO TELL TRACI BAKER EXACTLY WHAT TO TESTIFY TO.

YOU WILL HEAR THE DETAILS OF THE LETTER FROM THE INVESTIGATING OFFICER WHO WILL TESTIFY TO THE CONTENTS OF THE LETTER.

BUT JUST TO QUICKLY SUMMARIZE IT, IT SAYS SOMETHING TO THE EFFECT OF:

I WANT YOU TO DO SOMETHING FOR ME. IT MAY NOT SEEM IMPORTANT TO YOU, YOU MAY NOT UNDERSTAND THE SIGNIFICANCE OF IT, BUT, BELIEVE ME, IT WILL HELP MY CASE.

THERE WERE TWO INCIDENTS THAT I WANT YOU TO REMEMBER.

THE FIRST INCIDENT WAS AN INCIDENT IN MY HOUSE. YOU WERE SITTING THERE AT THE TABLE. ERIC AND MY FATHER WERE THERE. MY MOTHER WAS BRINGING FOOD IN TO THE TABLE.

SUDDENLY, MY FATHER, WITHOUT PROVOCATION, PUSHED THE FOOD AWAY AND SAID, "WHAT ARE YOU DOING TO THIS FOOD," OR, "WHAT HAVE YOU DONE TO THIS FOOD?"

AT THAT POINT, WE STOOD UP AND WE WENT OUTSIDE.

WE WENT TO HAMBURGER HAMLET.

[p. 9] AT HAMBURGER HAMLET - BEFORE WE GOT TO HAMBURGER HAMLET, ERIC SAID TO MY FATHER, "WHAT DO YOU THINK SHE TRIED TO DO, DAD?" AND SO ON AND SO FORTH.

FACTS WHICH INDICATE THAT TRACI BAKER WAS TOLD WHAT TO SAY.

AND THERE ARE OTHER ASPECTS OF THAT LETTER WHICH MAKE IT CLEAR THAT THIS WAS NOT AN ATTEMPT BY MR. MENENDEZ TO REFRESH THE WITNESS' RECOLLECTION, BUT THAT HE WAS PUTTING WORDS IN HER MOUTH, STATEMENTS LIKE:

"YOU DON'T REMEMBER THE DETAILS, YOU DON'T REMEMBER THE DATE, BUT I WILL SUPPLY YOU WITH THAT DATE AT A FUTURE TIME." AND SO ON AND SO FORTH.

VARIOUS STATEMENTS WHICH, TAKEN TOGETHER, LEAD ONE TO THE CONCLUSION THAT LYLE MENENDEZ SUBORNED PERJURY OF TRACI BAKER AND THAT SHE TESTIFIED FALSELY.

AS I SAID, WE WILL ALSO SHOW THAT THIS WAS MATERIAL TO THE DEFENSE AND CONTRIBUTED TO THE DEFENSE'S ARGUMENT.

AT THIS TIME, LADIES AND GENTLEMEN, WE ARE NOT SEEKING AN INDICTMENT. WE WISH TO INVESTIGATE THIS FULLY.

THERE ARE A NUMBER OF WITNESSES WHO WE SHOULD SPEAK TO BEFORE WE MAKE A DETERMINATION AS TO WHETHER OR NOT WE WILL SEEK AN INDICTMENT AND AGAINST WHOM.

AT THE VERY LEAST, WE CAN START WITH THE INVESTIGATING OFFICER, LES ZOELLER, L-E-S ZOELLER.

[p. 10] MR. ZOELLER WILL TESTIFY HE ATTENDED THE TRIAL OF THE TWO MENENDEZ BROTHERS AND THAT HE HEARD THE WITNESS TRACI BAKER TESTIFY; AND, THAT DURING HER TESTIMONY, SHE TESTIFIED TO THIS INCIDENT UNDER OATH.

HE WILL ALSO SAY THAT HE UNCOVERED THE LETTER FROM THE WITNESS AND HE WILL TESTIFY TO THE CONTENTS OF THAT LETTER.

NOW, WE ALSO HAVE TRACI BAKER HERE TODAY AND I WILL CALL TRACI BAKER TO THE STAND.

BUT I ANTICIPATE AT THIS TIME, AFTER SPEAKING TO HER ATTORNEY, THAT SHE WILL BE TAKING THE FIFTH AMENDMENT AT THIS POINT.

THAT IS WHAT WE HAVE TODAY.

WE HOPE IN THE FUTURE WE WILL BE ABLE TO PRESENT ADDITIONAL WITNESSES CONCERNING THIS MATTER.

THANK YOU VERY MUCH, LADIES AND GENTLEMEN.

THE FOREPERSON: THE JURORS ARE REMINDED THAT THE FOREMAN'S STATEMENT AND THE OPENING STATEMENT BY THE DEPUTY DISTRICT ATTORNEY ARE NOT EVIDENCE IN THIS CASE

AND ARE NOT TO BE CONSIDERED AS EVIDENCE BY ANY MEMBER OF THE GRAND JURY.

THE FOREPERSON: DEPUTY DISTRICT ATTORNEY CONN, YOU MAY PROCEED.

MR. CONN: YES.

AT THIS TIME I WOULD ASK THAT LES ZOELLER, WHO IS OUTSIDE, BE PERMITTED TO ENTER, ALONG WITH DEPUTY DISTRICT ATTORNEY CAROL NAJERA, WHO WILL DO THE QUESTIONING.

[p. 11] THE FOREPERSON: DETECTIVE LES ZOELLER?

THE WITNESS: THAT'S CORRECT.

THE FOREPERSON: PLEASE RAISE YOUR RIGHT HAND.

YOU DO SOLEMNLY SWEAR THE TESTIMONY YOU ARE ABOUT TO GIVE IN THE MATTER NOW PENDING BEFORE THE GRAND JURY OF THE COUNTY OF LOS ANGELES SHALL BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO HELP YOU GOD.

THE WITNESS: I DO.

THE FOREPERSON: PLEASE BE SEATED.

DETECTIVE ZOELLER, PLEASE STATE AND SPELL YOUR FULL NAME, SPEAKING DIRECTLY INTO THE MICROPHONE.

THE WITNESS: LESLIE H. ZOELLER.

L-E-S-L-I-E Z-O-E-L-L-E-R.

THE FOREPERSON: GOOD MORNING, DEPUTY DISTRICT CAROL NAJERA.

YOU MAY PROCEED.

MS. NAJERA: THANK YOU, MADAME FOREPERSON.

LESLIE H. ZOELLER, CALLED AS A WITNESS BEFORE THE LOS ANGELES COUNTY GRAND JURY, WAS DULY SWORN AND TESTIFIED AS FOLLOWS:

EXAMINATION

BY MS. NAJERA:

Q. MR. ZOELLER, WHAT IS YOUR OCCUPATION?

A. POLICE OFFICER FOR THE CITY OF BEVERLY HILLS, ASSIGNED TO THE DETECTIVE DIVISION.

Q. SIR, WERE YOU RESPONSIBLE TO INVESTIGATE THE [p. 12] CASE OF PEOPLE VERSUS ERIC GALEN MENENDEZ AND JOSEPH LYLE MENENDEZ?

A. YES.

Q. AND WERE YOU PRESENT AT THE TRIAL OF ERIC GALEN MENENDEZ AND JOSEPH LYLE MENENDEZ?

A. YES, I WAS.

Q. DO YOU KNOW AN INDIVIDUAL BY THE NAME OF TRACI BAKER?

A. YES, I DO.

Q. WILL YOU PLEASE DESCRIBE HER FOR THIS GRAND JURY.

A. A WHITE FEMALE, APPROXIMATELY 28 YEARS OLD, DARK HAIR.

SHE'S WAITING OUT IN THE NEXT ROOM AND SHE'S WEARING A DARK BLUE SUIT.

Q. IS IT YOUR UNDERSTANDING THAT SHE MAY BE TESTIFYING TODAY?

A. YES, IT IS.

Q. NOW, ON OCTOBER 12, 1993, DID TRACI BAKER APPEAR IN VAN NUYS SUPERIOR COURT, DEPARTMENT "N"?

A. YES, SHE DID.

Q. AND DID SHE TAKE AN OATH TO TELL THE TRUTH AT THAT TIME?

A. SHE DID.

Q. WAS THIS OATH ADMINISTERED BY THE CLERK OF THE COURT?

A. YES, IT WAS.

D. DID MISS BAKER TESTIFY?

[p. 13] A. YES, SHE DID.

MS. NAJERA: MADAME FOREMAN, I HAVE A DOCUMENT WHICH I WOULD LIKE MARKED AS PEOPLE'S 1 FOR IDENTIFICATION.

IT APPEARS TO BE A REPORTER'S TRANSCRIPT OF THE PROCEEDINGS OF OCTOBER 12, 1993, PAGES 12352 TO 12386.

MAY IT BE SO MARKED?

THE FOREPERSON: SO ORDERED.

(MARKED FOR I.D.: = EXHIBIT 1.)

MS. NAJERA: MAY I APPROACH THIS WITNESS?

THE FOREPERSON: YOU MAY.

Q. BY MS. NAJERA: SIR, SHOWING YOU WHAT HAS BEEN MARKED PEOPLE'S 1 FOR IDENTIFICATION.

DO YOU RECOGNIZE THAT DOCUMENT?

A. YES, I DO.

Q. CAN YOU TELL US WHAT THAT DOCUMENT IS.

A. THE DOCUMENT IS A TRANSCRIPT OF THE TESTIMONY OF TRACI BAKER.

Q. WERE YOU PRESENT IN COURT WHEN MISS BAKER TESTIFIED?

A. YES, I WAS.

Q. HAVE YOU HAD AN OPPORTUNITY TO LOOK AT THAT TRANSCRIPT?

A. YES, I HAVE.

Q. DOES THAT APPEAR TO BE HER TESTIMONY FROM OCTOBER 12, 1993?

A. IT IS, YES.

Q. NOW, AFTER THE TRIAL OF LYLE AND ERIC MENENDEZ, DID YOU CONTACT A WOMAN NAMED NORMA NOVELLI?

[p. 14] A. YES.

Q. DID YOU RECEIVE ANYTHING FROM MISS NOVELLI?

A. YES, I DID.

Q. CAN YOU TELL US WHAT YOU RECEIVED FROM MISS NOVELLI?

A. I RECEIVED A THREE-PAGE HANDWRITTEN LETTER ADDRESSED TO A MS. M.S. BAKER.

IT APPEARS TO BE - IT'S HANDWRITTEN AND IT APPEARS TO BE INSTRUCTIONS OR DIRECTIONS OF A SCRIPT FOR TESTIMONY.

MS. NAJERA: MADAME FOREMAN, I HAVE WHAT APPEARS TO BE A THREE-PAGE DOCUMENT ADDRESSED TO MISS BAKER.

I WOULD LIKE ALL THREE PAGES MARKED PEOPLE'S 2 FOR IDENTIFICATION.

THE FOREPERSON: SO ORDERED.

(MARKED FOR I.D.: = EXHIBIT 2.)

MS. NAJERA: MAY I APPROACH THE WITNESS?

THE FOREPERSON: YOU MAY, AND YOU MAY CONTINUE TO APPROACH THROUGHOUT THIS HEARING WITHOUT REQUESTING.

MS. NAJERA: THANK YOU.

Q. BY MS. NAJERA: SHOWING YOU WHAT HAS BEEN MARKED PEOPLE'S 2 FOR IDENTIFICATION.

WILL YOU EXAMINE THAT DOCUMENT AND TELL ME IF YOU RECOGNIZE IT.

A. YES, I DO.

Q. CAN YOU TELL THIS GRAND JURY WHAT THAT DOCUMENT IS.

A. IT'S A COPY OF THE THREE-PAGE LETTER THAT I [p. 15] RECEIVED FROM NORMA NOVELLI.

Q. CAN YOU READ THAT DOCUMENT TO THIS GRAND JURY.

A. I WILL TRY.

IT'S HARD TO READ, BUT I'LL TRY

IT'S DATED FEBRUARY 5. THERE IS NO YEAR INDICATED. IT STATES:

(READING:)

"LAW OFFICES.

"MS. BAKER.

"ALL RIGHT, TRACI, THIS IS THE INFORMATION WE DISCUSSED ON THE PHONE ABOUT VISITING ERIC.

"I'M GOING TO GET RIGHT TO THE POINT, BECAUSE AFTER YOU READ THIS AND FEEL YOU HAVE ABSORBED IT, I WANT YOU TO THROW IT AWAY. DO THAT RIGHT AWAY SO YOU DON'T FORGET.

"MAYBE YOU CAN TAKE NOTES IN YOUR OWN HANDWRITING.

"OKAY?

"WELL, BASICALLY, THERE ARE TWO INCIDENTS. THEY MAY SEEM STRANGE AND IRRELEVANT TO MY CASE, BUT I ASSURE YOU THEY WILL BE VERY HELPFUL. YOU JUST HAVE TO TRUST ME ON IT. LATER I CAN EXPLAIN WHY, BUT, FOR NOW, I WILL JUST LAY THEM OUT.

"I HAVE GIVEN A LOT OF [p. 16] THOUGHT TO THIS AND I REALLY FEEL THAT YOU CAN DO IT. HOWEVER, JUST LET ME KNOW IF YOU WOULD RATHER NOT.

"ALL RIGHT.

"THE FIRST INCIDENT IS AS FOLLOWS:

"YOU WERE AT THE BEVERLY HILLS HOUSE ABOUT TO EAT DINNER WITH ME, MY PARENTS AND MY BROTHER. ED WASN'T THERE.

"WE WILL DECIDE LATER AROUND WHAT DATE THIS INCIDENT OCCURRED. IT WAS A WEEKEND, HOWEVER."

AND THEN IN PARENTHESIS, "(I HATE WRITING IN PEN)."

"YOU AND I HAD SPENT THE DAY TOGETHER. MRS. MENENDEZ HAD COOKED DINNER AND IT WAS SERVED IN THE DINING ROOM. "EVERYONE WAS SEATED EXCEPT MRS. MENENDEZ. SHE WAS STILL BRINGING THIS AND THAT IN FROM THE KITCHEN.

"WE WERE SEATED" - I'M SORRY I JUST CAN'T READ THAT BOTTOM LINE. IT

(READING:)

- "NEXT TO ME WITH [] YOU TO THE" - AND THEN IT STARTS WITH [] PAGE - "SEATED AT THE HEAD OF [] MY LEFT.

[p. 17] "ERIC WAS SEATED ACROSS FROM US, BEHIND MR. MENENDEZ BY THE DOORS THAT OPEN TO THE FOYER.

"ALL THE FOOD WAS ON THE TABLE. THERE WAS LOTS OF IT BUT YOU DIDN'T REMEMBER WHAT THE FOOD WAS.

"ANYWAY, ALL OF A SUDDEN, MR. MENENDEZ SAID IN A STERN VOICE TO MRS. MENENDEZ, WHO WAS STANDING BEHIND YOU, "WHAT DID YOU DO TO THE FOOD?"

"THERE WAS A LONG SILENCE, OR AT LEAST IT SEEMED LONG, AND THEN MR. MENENDEZ SHOVED HIS PLATE FORWARD, KNOCKING OVER SOME STUFF.

"HE GOT UP AND SAID SOMETHING LIKE, 'GO OUT AND WAIT FOR ME BY THE CAR, BOYS. WE ARE GOING OUT TO EAT.'

"THEN I GOT UP IMMEDIATELY AND SAID, "COME ON, TRACI," AND WE BOTH WALKED OUT INTO THE FOYER.

"ERIC WALKED OUT, TOO.

"YOU GOT YOUR PURSE AND JACKET, WE WALKED OUTSIDE AND STOOD IN THE FRONT OF THE BIG MERCEDES.

"ERIC AND I WERE DISCUSSING SOMETHING, WHISPERING. YOU WERE JUST KIND OF STANDING THERE, CONFUSED AND EMBARRASSED.

"THEN MR. MENENDEZ CAME STORMING [p. 18] OUT OF THE HOUSE. HE SEEMED UPSET.

"EITHER ERIC OR I - YOU CAN'T REMEMBER WHICH - SAID TO HIM, 'WHAT'S THE MATTER, DAD? DO YOU THINK SHE TRIED SOMETHING?'

"AS MR. MENENDEZ WAS GETTING INTO THE FRONT SEAT, HE SAID, 'I DON'T KNOW. BUT I DON'T TRUST HER TODAY.'

"WE ALL GOT IN THE CAR, YOU AND I IN THE BACK SEAT, AND WE DROVE IN SILENCE, LISTENING TO SOME RADIO STATION.

"WE MADE A RIGHT COMING OUT OF OUR HOUSE, BUT YOU ARE UNSURE OF THE WAY WE WENT AFTER THAT.

"ANYWAY, WE ENDED UP PARKING SOMEWHERE AND EATING AT HAMBURGER HAMLET. IT WAS A BIG ONE.

"WE ALL ATE DINNER, TALKING ABOUT VARIOUS THINGS.

"MR. MENENDEZ WAS CHARMING. HE PAID THE BILL; WE DROVE BACK HOME.

"YOU AND I STAYED OUT FRONT AND KISSED FOR A LONG TIME. YOU DIDN'T FEEL YOU SHOULD ASK ABOUT WHAT HAD HAPPENED EARLIER.

"YOU THEN LEFT IN YOUR CAR. IT WASN'T THAT LATE. YOU NEVER SAW MRS. MENENDEZ. IT HAD JUST GOTTEN DARK WHEN WE LEFT FOR THE HAMBURGER HAMLET.

[p. 19] "YOU DROVE HOME, STILL CONFUSED ABOUT WHAT HAPPENED IN THE DINING ROOM, ALTHOUGH IT SEEMED OBVIOUS MR. MENENDEZ THOUGHT MRS. MENENDEZ DID SOMETHING TO THE FOOD.

"YOU WERE TRYING TO ASK ME WHAT IT WAS ALL ABOUT, BUT YOU JUST COULDN'T.

"OKAY?

"THAT'S THE FIRST INCIDENT.

"YOU REALLY DON'T NEED TO KNOW ANY MORE DETAILS THAN I'VE" - AND I CAN'T READ THE WORD - "HERE. IT WAS A LONG TIME AGO. IT WOULD BE STRANGE IF YOU REMEMBERED THINGS TOO WELL.

"HOWEVER, YOU DO REMEMBER THE STATEMENTS I MENTIONED ABOVE VERY WELL, WHO SAID WHAT TO WHOM.

"YOU DIDN'T REMEMBER THE UNIMPORTANT CONVERSATIONS, LIKE WHAT WAS SAID AT THE HAMBURGER HAMLET, ET CETERA.

"THE BEST ANSWER TO ANY QUESTION YOU DON'T KNOW THE ANSWER TO IS, 'I DON'T REMEMBER.'

"IT'S OBVIOUS WHY YOU REMEMBER CERTAIN THINGS AND CERTAIN STATEMENTS. IT WAS SCARY AND CONFUSING."

AND THAT'S THE END OF THE THREE-PAGE LETTER.

Q. NOW, DETECTIVE ZOELLER, WHEN YOU WERE PRESENT [p. 20] AT - WHEN SHE TESTIFIED IN COURT ON OCTOBER 12, DID SHE TESTIFY TO AN INCIDENT OF HAVING DINNER AT THE MENENDEZ HOUSE THAT WAS SIMILAR TO WHAT WAS DESCRIBED IN THE LETTER?

A. YES, SHE DID.

Q. DID YOU GO THROUGH THE LETTER AND DETERMINE WHERE HER TESTIMONY CORRESPONDED WITH THE LETTER?

A. YES.

Q. CAN YOU TELL US BRIEFLY WHERE HER TESTIMONY CORRESPONDED WITH THE LETTER.

A. IT CORRESPONDED WITH HER HAVING DINNER WITH THE MENENDEZ FAMILY.

ONLY THE MENENDEZ FAMILY WERE PRESENT, ALONG WITH HERSELF.

IT WAS IN THE DINING ROOM.

SHE TESTIFIED THAT MR. MENENDEZ' BACK WAS TO THE BACK, TO THE DOOR OF THE FOYER.

SHE TESTIFIED THAT MRS. MENENDEZ WAS PUTTING FOOD OUT AND THAT SHE WAS STILL BRINGING FOOD BACK AND FORTH.

SHE TESTIFIED THAT MR. MENENDEZ PUSHED HIS PLATE BACK, KNOCKING OVER ITEMS, AND STOOD UP AND EXCLAIMED, "WHAT DID YOU DO TO THE FOOD?"

SHE TESTIFIED THAT HE TOLD THE BOYS THAT THEY WERE GOING OUT TO DINNER.

SHE TESTIFIED THAT SHE, ALONG WITH ERIC AND LYLE, WENT OUT FRONT BY THE CARS AND WAITED FOR MR. MENENDEZ TO COME OUT.

SHE TESTIFIED WHEN MR. MENENDEZ CAME OUT, SHE [p. 21] AND LYLE WENT INTO THE BACK SEAT OF THE CAR AND ERIC AND MR. MENENDEZ IN THE FRONT.

SHE TESTIFIED THEY WENT TO THE HAMBURGER HAMLET AND THAT THEY HAD A CONVERSATION THERE NOT PERTAINING TO THE INCIDENT THAT OCCURRED AT THE HOUSE.

SHE TESTIFIED THAT MR. MENENDEZ WAS VERY CHARMING.

AND SHE TESTIFIED THAT SHE NEVER ASKED ABOUT THE INCIDENT AT THE HOUSE.

Q. WERE YOU PRESENT AT THE END OF THE TRIAL?

A. YES, I WAS.

Q. AT THE END OF THE TRIAL, DID THE DEFENSE COMMENT ON MISS BAKER'S TESTIMONY?

A. YES, THEY DID.

Q. AND DID THEY ARGUE ANYTHING WITH RESPECT TO MISS BAKER'S TESTIMONY AND WHY IT WAS IMPORTANT?

A. YES.

Q. AND WHAT WAS THAT?

A. THE CLOSING ARGUMENT - AS FAR AS THIS PORTION IS CONCERNED, THE CLOSING ARGUMENT STATED THAT THIS INCIDENT SHOWS THE STATE OF MIND OF THE BROTHERS AND WHY THE BROTHERS WERE IN FEAR OF, IN THIS INSTANCE, THE MOTHER.

MS. NAJERA: THANK YOU, SIR.

THE FOREPERSON: IF ANY MEMBERS OF THE GRAND JURY HAVE ANY QUESTIONS, PLEASE WRITE THEM ON A PIECE OF PAPER.

THEY WILL BE PICKED UP BY THE SERGEANT-AT-ARMS.

[p. 22] (SHORT PAUSE.)

Q. BY MS. NAJERA: DETECTIVE ZOELLER, WERE YOU EVER INFORMED OF WHAT FOOD WAS COOKED FOR THAT DINNER BY MRS. MENENDEZ?

A. NO.

Q. CAN YOU TELL US HOW YOU CAME TO LOCATE THIS LETTER.

A. THE LETTER CAME TO MY ATTENTION THROUGH DEPUTY DISTRICT ATTORNEY PAMELA BOZANICH.

SHE HAD BEEN TALKING TO A WRITER BY THE NAME OF DOMINIC DUNN, AND HE WAS TALKING TO HER ABOUT NORMA NOVELLI AND HER CONNECTION TO LYLE.

LYLE WAS USING HER TELEPHONE AS FAR AS A THREE-WAY - USING THE TELEPHONE FOR THREE-WAY CONFERENCE CALLS.

AND, IN THE SAME CONVERSATION, DOMINIC DUNN HAD GIVEN HER, PAMELA BOZANICH, A COPY OF TWO OF THE PAGES THAT I HAVE THREE OF.

AND, WITH THAT INFORMATION, I WENT TO INTERVIEW NORMA NOVELLI AND OBTAINED ALL THREE PAGES.

Q. AND DO YOU KNOW HOW MISS NOVELLI GOT THE LETTER?

A. JUST BY WHAT SHE TOLD ME.

SHE SAID IT CAME IN AN UNMARKED ENVELOPE ABOUT 4 MONTHS PRIOR TO MY INTERVIEW, WHICH WAS APPROXIMATELY A MONTH AGO, WITH NORMA.

AND IT CAME IN THE MAIL, AS I SAID, AND IT WAS [p. 23] UNSIGNED AND IN AN UNMARKED ENVELOPE TO HER.

Q. AND WAS IT YOUR UNDERSTANDING THAT MISS NOVELLI RECEIVED CORRESPONDENCE FROM MR. LYLE MENENDEZ?

A. YES.

Q. DO YOU KNOW WHERE THE ORIGINAL OF THAT COPY IS?

A. I DO NOT, NO.

Q. DID YOU EVER LEARN WHAT THE SECOND INCIDENT MENTIONED IN THE LETTER WAS?

A. NO, I DID NOT.

Q. DOES THE LETTER APPEAR TO BE COMPLETE OR NOT?

A. IT APPEARS TO BE INCOMPLETE.

MS. NAJERA: THANK YOU, SIR.

THE FOREPERSON: ARE THERE ANY ADDITIONAL QUESTIONS FROM THE GRAND JURORS?

(SHORT PAUSE.)

THE FOREPERSON: THERE BEING NO FURTHER QUESTIONS, DETECTIVE ZOELLER, BEFORE YOU LEAVE, PLEASE LISTEN VERY CAREFULLY TO WHAT I'M GOING TO SAY TO YOU NOW:

YOU ARE ADMONISHED NOT TO REVEAL TO ANY OTHER PERSON, EXCEPT AS ORDERED BY THE COURT, WHAT QUESTIONS WERE ASKED OF YOU AND WHAT RESPONSES WERE GIVEN.

IN ADDITION, YOU ARE NOT TO REVEAL ANY OTHER MATTERS CONCERNING THE NATURE OR SUBJECT OF THE INVESTIGATION WHICH YOU LEARNED DURING YOUR APPEARANCE HERE, UNLESS AND UNTIL SUCH TIME AS A TRANSCRIPT OF THESE PROCEEDINGS IS MADE PUBLIC.

[p. 24] I WISH TO ADVISE YOU ALSO THAT A VIOLATION OF THIS ORDER CAN BE THE BASIS OF A CONTEMPT CHARGE AGAINST YOU.

DO YOU UNDERSTAND?

THE WITNESS: YES, I DO.

THE FOREPERSON: THANK YOU.

YOU ARE EXCUSED.

(THE WITNESS EXITS THE GRAND JURY HEARING ROOM.)

MS. NAJERA: MADAME FOREMAN, AT THIS TIME WE WOULD LIKE TO CALL TRACI BAKER.

THE FOREPERSON: TRACI BAKER?

THE WITNESS: YES.

THE FOREPERSON: PLEASE RAISE YOUR RIGHT HAND.

DO YOU SOLEMNLY SWEAR THAT THE EVIDENCE YOU SHALL GIVE IN THIS MATTER NOW PENDING BEFORE THE GRAND JURY OF THE COUNTS TEA OF LOS ANGELES, SHALL BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

THE WITNESS: YES, MA'AM.

THE FOREPERSON: PLEASE BE SEATED.

MISS BAKER, PLEASE STATE AND SPELL YOUR FULL NAME, SPEAKING DIRECTLY INTO THE MICROPHONE. THE WITNESS: FIRST NAME FIRST?

OKAY.

TRACI, T-R-A-C-I, LE, L-E, BAKER, B-A-K-E-R.

THE FOREPERSON: YOU MAY PROCEED.

[p. 25] MS. NAJERA: THANK YOU.

TRACI LE BAKER, CALLED AS A WITNESS
BEFORE THE LOS ANGELES COUNTY GRAND JURY,
WAS DULY SWORN AND TESTIFIED AS FOLLOWS:

EXAMINATION

BY MS. NAJERA:

Q. MISS BAKER, ARE YOU ACQUAINTED WITH
THE DEFENDANT LYLE MENENDEZ?

A. AT THIS TIME, I WASN'T ABLE TO SPEAK
WITH MY ATTORNEY. HE'S STILL WITH THE SPECIAL
MASTER.

MAY I ASK PERMISSION TO GO AND CONFER
WITH HIM FOR A MOMENT?

THE FOREPERSON: IF THE SERGEANT-AT-
ARMS WOULD PLEASE ESCORT MISS BAKER TO THE
DOOR SO SHE MAY SPEAK WITH HER ATTORNEY.

(THE WITNESS EXITS THE GRAND
JURY HEARING ROOM.)

THE SERGEANT-AT-ARMS: MADAME FORE-
MAN, IT IS GOING TO BE A FEW MINUTES.

THE FOREPERSON: THANK YOU.

MS. NAJERA: MADAME FOREMAN, MAY WE
HAVE PERMISSION TO LEAVE THE GRAND JURY
ROOM FOR A MOMENT?

THE FOREPERSON: YES, YOU MAY.

[p. 26] (THE DEPUTIES DISTRICT ATTORNEY EXIT
THE GRAND JURY HEARING ROOM.)

(SHORT PAUSE.)

THE FOREPERSON: BACK ON THE RECORD.

MS. NAJERA: WE WOULD RECALL TRACI
BAKER.

THE FOREPERSON: THANK YOU.

THE FOREPERSON: MISS BAKER, YOU WILL
RECALL THAT HAVE PREVIOUSLY BEEN SWORN
AND ARE STILL UNDER OATH.

THE WITNESS: YES.

THE FOREPERSON: YOU MAY PROCEED.

MS. NAJERA: THANK YOU.

Q. MISS BAKER, ARE YOU ACQUAINTED WITH
THE DEFENDANT LYLE MENENDEZ?

A. BASED ON THE ADVICE OF MY COUNSEL, I
RESPECTFULLY DECLINE TO ANSWER THE QUES-
TION BECAUSE MY ANSWER MIGHT TEND TO
INCRIMINATE ME.

Q. DID YOU KNOW HIM ON AUGUST - DURING
AUGUST OF 1989?

A. AGAIN, I HAVE TO GO CONFER WITH COUN-
SEL.

I APOLOGIZE IF IT'S INCONVENIENT, BUT THIS
IS WHAT I HAVE BEEN INSTRUCTED TO DO.

MAY I DO THIS?

THE FOREPERSON: THE SERGEANT-AT-ARMS WILL ESCORT MISS BAKER TO THE DOOR TO COMPLY WITH HER REQUEST TO SPEAK WITH HER COUNSEL.

[p. 27] (THE WITNESS EXITS THE GRAND JURY HEARING ROOM.)

(SHORT PAUSE.)

THE FOREPERSON: MISS BAKER, LET ME REMIND YOU THAT YOU ARE STILL UNDER OATH.

THE WITNESS: THANK YOU.

Q. BY MS. NAJERA: AND THE QUESTION I ASKED YOU WAS:

DID YOU KNOW HIM IN AUGUST OF 1989?

A. AGAIN, BASED ON THE ADVICE OF COUNSEL, I RESPECTFULLY DECLINE TO ANSWER THE QUESTION BECAUSE MY ANSWER MIGHT TEND TO INCRIMINATE ME.

Q. WHEN YOU WERE SERVED WITH A SUBPOENA FOR THIS GRAND JURY PROCEEDING, IT WAS ALSO ORDERED THAT YOU BRING WITH YOU SOME DOCUMENTS RELATING TO YOUR CORRESPONDENCE WITH LYLE MENENDEZ.

DID YOU BRING THESE DOCUMENTS?

A. I'M GOING TO HAVE TO AGAIN CONFER.
I'M SORRY.

MR. CONN: BEFORE THE WITNESS GETS UP, MADAME FOREMAN, I THINK AT THIS POINT WE MAY NEED THE PRESIDING JUDGE TO DETERMINE WHETHER OR NOT THE ANSWER MAY TEND TO INCRIMINATE THE WITNESS.

I THINK THIS IS A QUESTION THAT WILL CLEARLY NOT INCRIMINATE.

SHE IS UNDER GRAND JURY SUBPOENA TO PRODUCE THE [p. 28] DOCUMENTS.

SHE'S FAILED TO PRODUCE THE DOCUMENTS, AND WE WILL ASK THAT SHE BE HELD IN CONTEMPT OF THIS COURT BY THE PRESIDING JUDGE.

MR. WHITE: MADAME FOREMAN, MAY WE TO A A 10-MINUTE RECESS, ORDER THE WITNESS BACK IN 10 MINUTES, SO I CAN CONFER WITH THE PRESIDING JUDGE?

THE FOREPERSON: MISS BAKER, YOU ARE EXCUSED AND ORDERED TO RETURN IN 10 MINUTES TO THIS HEARING ROOM WITHOUT FURTHER SUBPOENA, REMINDER OR ORDER.

DO YOU UNDERSTAND?

THE WITNESS: YES.

YOU ARE ADMONISHED NOT TO REVEAL TO ANY OTHER PERSON, EXCEPT AS ORDERED BY THE COURT, WHAT QUESTIONS WERE ASKED OF YOU AND WHAT RESPONSES WERE GIVEN.

IN ADDITION, YOU ARE NOT TO REVEAL ANY OTHER MATTERS CONCERNING THE NATURE OR

SUBJECT OF THE INVESTIGATION-WHICH YOU LEARNED DURING YOUR APPEARANCE HERE, UNLESS AND UNTIL SUCH TIME AS A TRANSCRIPT OF THESE PROCEEDINGS IS MADE PUBLIC.

I WISH TO ADVISE YOU ALSO THAT A VIOLATION OF THIS ORDER CAN BE THE BASIS OF A CONTEMPT CHARGE AGAINST YOU.

DO YOU UNDERSTAND?

THE WITNESS: YES.

THE FOREPERSON: THANK YOU.

YOU ARE EXCUSED.

THE WITNESS: OKAY.

[p. 29] (THE WITNESS EXITS THE GRAND JURY HEARING ROOM.)

THE FOREPERSON: WE ARE IN RECESS FOR 10 MINUTES.

THE GRAND JURORS ARE ADMONISHED THAT THEY ARE NOT TO FORM OR EXPRESS ANY OPINIONS ABOUT THIS CASE OR DISCUSS IT AMONG THEMSELVES UNTIL THE MATTER COMES BEFORE US FOR DELIBERATION.

WE ARE IN RECESS FOR 10 MINUTES.

(SHORT RECESS TAKEN.)

* * *

[p. 31] THIS GRAND JURY.

THE SHERIFF IS ORDERED TO TRANSPORT YOU FORTHWITH TO DEPARTMENT 110 OF THE SUPERIOR COURT FOR FURTHER PROCEEDINGS REGARDING THIS CONTEMPT.

I FURTHER DIRECT THE GRAND JURY LEGAL ADVISOR, DEPUTIES DISTRICT ATTORNEY AND THE COURT REPORTER TO PROCEED IMMEDIATELY TO DEPARTMENT 110 FOR FURTHER PROCEEDINGS IN THIS MATTER.

(THE WITNESS EXITS THE GRAND JURY HEARING ROOM.)

THE FOREPERSON: THE GRAND JURY IS NOW IN RECESS IN THIS MATTER.

DO WE NEED TO BE ADMONISHED IN THIS?

MR. WHITE: LET'S GO BACK ON THE RECORD SO SHE CAN DO SOMETHING.

THE FOREPERSON: WE ARE BACK ON THE RECORD OUT OF THE PRESENCE OF THE WITNESS.

MS. NAJERA: THE ONLY TWO DOCUMENTS THAT WE HAVE MARKED FOR PURPOSE OF THIS HEARING, EXHIBITS 1 AND 2, WE WOULD ASK THAT THEY BE PUT IN EVIDENCE RIGHT NOW.

THE FOREPERSON: SO ORDERED.

(RECEIVED IN EVID.: = EXHIBITS 1 & 2.)

THE FOREPERSON: THE GRAND JURORS HAVE BEEN ADMONISHED REGARDING DISCUSSION OF THE CASE.

PLEASE REMEMBER AND FOLLOW THE ADMONITION.

THE GRAND JURY IS NOW IN RECESS IN THIS [p. 32] MATTER.

(RECESS TAKEN.)

[p. 33] LOS ANGELES, CALIFORNIA; MONDAY,
MARCH 21, 1994

DEPARTMENT NO. 110 HON. FLORENCE MARIE
COOPER, JUDGE

11:40 A.M.

THE COURT: WE ARE ON THE RECORD IN CHAMBERS.

I AM SUBSTITUTING FOR DEPARTMENT 100 ON THE MOTION TO QUASH A GRAND JURY SUBPOENA IN GRAND JURY PROCEEDINGS.

TRACI BAKER IS THE PERSON UNDER INVESTIGATION IN THIS PROPOSED INDICTMENT.

IS THAT CORRECT, MR. WHITE?

MR. WHITE: YES.

IT IS NOT AN INDICTMENT. IT IS JUST AN INVESTIGATORY HEARING. SO THEY WEREN'T SEEKING AN INDICTMENT.

THE COURT: BECAUSE THAT'S PART OF WHAT I NEED TO UNDERSTAND BEFORE I CAN DO MUCH OF ANYTHING WITH THIS.

TELL ME THE DIFFERENCE BETWEEN A PLAIN INVESTIGATORY PROCEEDING AND SOMETHING THAT'S HEADING TOWARD INDICTMENT.

WHAT IS THIS?

MR. WHITE: THE MAIN DIFFERENCE IS JUST AS IT'S STATED.

THE DISTRICT ATTORNEY WILL COME IN AND THEY ARE ONLY INVESTIGATING A POSSIBLE CRIMINAL ACTION, BUT THEY WON'T BE REQUESTING AN INDICTMENT HEARING AT THAT TIME.

IT COULD LATER TURN INTO AN INDICTMENT OR IT COULD JUST BE A PROCEDURE FOR THE DISTRICT ATTORNEY'S [p. 34] OFFICE TO GAIN INFORMATION.

IN THIS PROCEEDING, THEY WERE NOT REQUESTING AN INDICTMENT AT THIS TIME.

THE COURT: BUT IF SOMEONE IS GOING TO BE INDICTED AS A RESULT OF THIS INVESTIGATION, IT'S PROBABLY TRACI BAKER?

MR. WHITE: YES.

THE ALLEGATIONS ARE POSSIBLE PERJURY REGARDING HER TESTIMONY IN THE MENENDEZ TRIAL.

THE COURT: JUST THROUGH THE MEDIA, I THINK I UNDERSTAND WHY THIS INVESTIGATION IS ON GOING.

THERE HAS BEEN AN INDICATION THAT A LETTER WAS WRITTEN BY ERIC OR LYLE -

MR. WHITE: I BELIEVE IT WAS WRITTEN BY LYLE.

THE COURT: - LYLE TO THIS WITNESS INSTRUCTING HER HOW TO TESTIFY.

AND OBVIOUSLY THESE PROCEEDINGS INVOLVE A GRAND JURY SUBPOENA TO MISS BAKER TO PRODUCE ANY CORRESPONDENCE FROM LYLE MENENDEZ.

MR. WHITE: THAT'S CORRECT.

MY CONCERN, CERTAINLY, IS EXPRESSED BY HER ATTORNEY THAT THE PRODUCTION OF ANY SUCH CORRESPONDENCE COULD TEND TO INCRIMINATE HER.

AND IF, IN FACT, SHE'S THE FOCUS OF THIS INVESTIGATION, THERE WOULD APPEAR TO BE SOME MERIT TO THAT.

THE COURT: I WOULD IMAGINE WHAT WE NEED TO DO IS TO PROCEED WITH A CLOSED HEARING IN THIS COURTROOM.

IS MISS BAKER THERE ALONG WITH HER ATTORNEY?

[p. 35] MR. WHITE: MISS BAKER IS HERE.

HER ATTORNEY IS OUTSIDE, BUT HE IS PREPARED TO COME IN IF SHE REQUESTS HIS APPEARANCE, WHICH I BELIEVE SHE WILL.

THE COURT: I BELIEVE THAT'S PRETTY PREDICTABLE.

I THINK THAT'S WHAT WE ARE GOING TO HAVE TO DO, THEN, WE CAN DO IT IN THE COURTROOM. BECAUSE I CAN SIMPLY LOCK THE COURT.

IT'S ALMOST 12:00 O'CLOCK.

MS. NAJERA: IT'S CONVENIENT FOR EVERYBODY TO DO THIS NOW -

THE COURT: I THINK EVERYONE IS HERE.

WHY DON'T WE JUST DO THIS NOW, THEN, AND INSTRUCT RENEE TO LOCK THE COURTROOM.

AND YOU CAN ASK MISS BAKER IF SHE WANTS HER ATTORNEY IN SO WE DON'T LOCK HIM OUT IN THE HALL.

(SHORT PAUSE.)

THE COURT: WE ARE ON THE RECORD TO HEAR PROCEEDINGS IN CONNECTION WITH A MOTION TO QUASH A GRAND JURY SUBPOENA.

FOR THE RECORD, ALTHOUGH WE ARE IN THE COURTROOM, WE ARE NOT IN OPEN COURT IN THAT THE COURT HAS BEEN LOCKED.

IS THAT CORRECT?

THE CLERK: THAT IS CORRECT, YOUR HONOR.

THE COURT: THE PERSONS PRESENT PLEASE STATE YOUR [p. 36] NAMES FOR THE RECORD.

MR. WHITE: TERRY WHITE, DEPUTY DISTRICT ATTORNEY AND ALSO LEGAL ADVISOR FOR THE L.A. COUNTY GRAND JURY.

MR. CONN: DAVID CONN, DEPUTY DISTRICT ATTORNEY.

MR. GABBERT: PAUL GABBERT, G-A-B-B-E-R-T, COUNSEL FOR THE WITNESS TRACI BAKER.

THE COURT: AND MISS BAKER HAS REQUESTED THAT YOU BE PRESENT IN THIS PROCEEDING.

IS THAT CORRECT?

MR. GABBERT: THAT'S CORRECT.

THE COURT: MISS BAKER IS PRESENT AND ONE MORE PERSON PRESENT, GRAND JURY INVESTIGATOR DENNIS DUARTE.

MS. NAJERA: MAY MISS BAKER SIT AT COUNSEL TABLE?

THE COURT: SHE MAY.

ALL RIGHT.

I HAVE BEEN PROVIDED WITH A COPY OF A MOTION TO QUASH A GRAND JURY SUBPOENA AND FEDERAL AUTHORITIES IN SUPPORT OF THAT MOTION.

NEEDLESS TO SAY, I HAVEN'T READ THOSE.

LET ME ASK A COUPLE OF PRELIMINARY QUESTIONS TO SEE IF I UNDERSTAND EXACTLY WHAT THE ISSUE IS.

HAS MISS BAKER BEEN SUBPOENAED TO BOTH TESTIFY AND PRODUCE DOCUMENTS?

MR. CONN: THAT'S CORRECT.

THE COURT: HAS ANY TESTIMONY BEEN TAKEN?

MR. CONN: YOUR HONOR, THE WITNESS TOOK THE STAND THIS MORNING BEFORE THE GRAND JURY, WE ASKED A COUPLE OF QUESTIONS OF HER AND SHE INVOKED HER FIFTH AMENDMENT [p. 37] PRIVILEGE TO BOTH OF THOSE QUESTIONS.

WE WERE THEN BEGINNING THE PROCESS OF ASKING HER WHETHER SHE HAD PRODUCED THE DOCUMENTS THAT SHE WAS SUBPOENAED TO PRODUCE BEFORE THE GRAND JURY; AND, ONCE AGAIN, SHE WAS INVOKING HER FIFTH AMENDMENT PRIVILEGE AS TO THAT.

SO WE WERE NOT ABLE TO ELICIT FROM HER THE FACT THAT SHE HAS FAILED TO PRODUCE DOCUMENTS.

THE COURT: ALL RIGHT.

ALTHOUGH THERE HAS BEEN A REQUEST TO TESTIFY AND AN INVOCATION OF THE FIFTH AMENDMENT, I DON'T THINK THAT ISSUE IS BEFORE THE COURT.

IT SEEMS TO ME THAT ALL IS AT ISSUE HERE IS THE DEFENDANT'S MOTION TO QUASH THE SUBPOENA WITH RESPECT TO DOCUMENTS AND AS TO WHETHER THERE IS A FIFTH AMENDMENT PRIVILEGE CONCERNING TESTIMONY.

THAT'S DOWN THE LINE, I GUESS, IN LATER LITIGATION.

MISS BAKER HAS BEEN ASKED TO PRODUCE LETTERS OR ANY CORRESPONDENCE THAT SHE HAS RECEIVED FROM LYLE MENENDEZ.

THE MOTION FILED BY THE DEFENSE CONTENTS THAT THE PRODUCTION OF THOSE DOCUMENTS, EVEN IF THE DOCUMENTS WERE NOT WRITTEN BY HER, ARGUABLY, MIGHT NOT BE INCRIMINATING.

THE CONTENTION OF THE DEFENSE IS THAT THE PRODUCTION OF THE DOCUMENTS IS AN INCRIMINATING ACT IN ITSELF AND IT'S PROTECTED BY THE FIFTH AMENDMENT AND THE [p. 38] DEFENDANT WOULD BE ENTITLED TO IMMUNITY BEFORE SHE WOULD BE REQUIRED TO PRODUCE THEM.

SO PERHAPS I SHOULD HEAR FROM THE PEOPLE IN RESPONSE TO THIS.

MR. CONN: THE AUTHORITY THAT WE WERE ABLE TO REFER TO AT THIS POINT IN TIME WAS UNITED STATES VS. DOE, UNITED STATES SUPREME COURT, 1984 CASE AT 104 SUPERIOR COURT 1237.

IT'S MY UNDERSTANDING FROM UNITED STATES VS. DOE THAT THE PRODUCTION OF RECORDS ITSELF IS REQUIRED.

IN THIS CASE INVOLVING A FEDERAL STATUTE CONCERNING USE IMMUNITY, THE SUPREME COURT HELD THAT THE WITNESS MAY RECEIVE USE

IMMUNITY AS TO THOSE DOCUMENTS THEMSELVES, BUT THE CONTENTS OF THE DOCUMENTS WERE NEVERTHELESS ADMISSIBLE AND WERE NOT PRIVILEGED AND HAD TO BE PRODUCED.

SO I THINK THAT THE FIRST ISSUE THAT MAY ARISE IS THE DIFFERENCE BETWEEN THE FEDERAL AUTHORITIES DEALING WITH A FEDERAL USE IMMUNITY STATUTE AND CALIFORNIA, WHICH DOES NOT HAVE A SIMILAR STATUTE.

WERE THIS TO BE ARGUED IN FEDERAL COURT, THE PRACTICAL EFFECT OF THIS, I BELIEVE, WOULD BE THAT THE WITNESS WOULD BE REQUIRED TO PRODUCE THE DOCUMENTS, BUT THAT THOSE DOCUMENTS WOULD NOT BE SOMETHING THAT WE COULD USE AGAINST THIS PARTICULAR WITNESS.

SO SHE WOULD NOT HAVE IMMUNITY FOR THE ENTIRE CRIME, BUT THOSE DOCUMENTS COULD NOT BE USED AGAINST HER IN A CRIMINAL PROCEEDING.

[p. 39] WE THEN TURN TO THE STATE LAW, WHERE WE HAVE NO SUCH USE IMMUNITY BY STATUTE AND WE NEED TO DETERMINE THE DISTINCTION TO BE DRAWN THERE.

MY OPINION, YOUR HONOR, IS, AT MOST, WE WOULD BE GUIDED BY THE SAME STANDARD; THAT IS, AT THE VERY MOST, WE COULD NOT USE THOSE DOCUMENTS AGAINST THIS WITNESS IN A CRIMINAL PROCEEDING.

THE QUESTION IS WHETHER THAT STANDARD EVEN APPLIES UNDER THE STATE LAW.

BUT MY POSITION IS THAT, AT LEAST AT THIS POINT, THE WITNESS SHOULD BE ORDERED TO PRODUCE THE DOCUMENTS.

THERE IS A VALID SUBPOENA ORDERING HER TO PRODUCE THE DOCUMENTS, AND THE QUESTION OF WHAT USE CAN BE MADE OF THOSE DOCUMENTS IN THE FUTURE IS SOMETHING THAT THIS COURT OR SOME OTHER COURT CAN DETERMINE AT SUCH TIME THAT THE PEOPLE SEEK TO USE THOSE DOCUMENTS IN AN ACTION AGAINST HER.

THE COURT: I DON'T THINK THAT'S GOING TO PROVIDE MUCH COMFORT TO THE DEFENSE.

LET ME ASK YOU THIS:

ASSUMING THAT IN CALIFORNIA, WHERE WE HAVE TRANSACTIONAL IMMUNITY, ASSUMING THAT THAT APPLIED TO THIS CASE - AND I'M NOT SURE WHETHER THAT WOULD CREATE A DISTINCTION THAT MAKES MUCH DIFFERENCE IN THIS CASE IN TERMS OF THE EFFECT IT WOULD HAVE - ARE THE PEOPLE WILLING TO GRANT THIS WITNESS TRANSACTIONAL IMMUNITY IN EXCHANGE FOR THE PRODUCTION OF THE DOCUMENTS?

[p. 40] MR. CONN: NO, YOUR HONOR, WE ARE NOT.

IN FACT, THERE IS ANOTHER MATTER WHICH IS CLOSELY RELATED TO THE ONE WE ARE DISCUSSING.

IN FACT, IT'S SOMEWHAT INEXTRICABLE FROM THE MATTER WE ARE DISCUSSING, WHICH I SHOULD BRING TO THE COURT'S ATTENTION

ALTHOUGH, SPECIFICALLY, I DON'T THINK THE MATTER IS PROBABLY REALLY BEFORE THE COURT.

AND THAT IS THIS:

AFTER I HAD AN OPPORTUNITY TO REVIEW THE AUTHORITIES THIS WEEKEND CONCERNING THIS MATTER - WELL, I SHOULD POINT OUT ON FRIDAY, YOUR HONOR, WE OBTAINED A SEARCH WARRANT TO SEARCH THE WITNESS' HOME.

THE DOCUMENTS THAT WE ARE SEEKING ARE NOT THE DOCUMENTS THAT ARE NORMALLY SUBJECT ONLY TO A GRAND JURY SUBPOENA, SUCH AS THE DOCUMENTS THAT WERE INVOLVED IN UNITED STATES VS. DOE.

WE ARE SEEKING DOCUMENTS WHICH ARE CLEARLY INCRIMINATING OR EVIDENCE OF A CRIME. AND, AS SUCH, THEY ARE SUBJECT TO A SEARCH WARRANT AS WELL AS A GRAND JURY SUBPOENA.

SO LAST FRIDAY WE OBTAINED A SEARCH WARRANT FROM JUDGE POUNDERS AND WE WENT TO THE HOME OF THE WITNESS AND WE SEARCHED HER HOME.

WE DID NOT FIND THE DOCUMENTS.

SHE DID INDICATE DURING THE SEARCH THAT THE DOCUMENTS WERE TURNED OVER TO HER ATTORNEY, MR. GABBERT.

SHE WAS, OF COURSE, STILL ORDERED TO APPEAR BEFORE THE GRAND JURY TODAY AND PRODUCE THOSE DOCUMENTS.

[p. 41] WHAT WE DECIDED TO DO, SINCE THESE WERE DOCUMENTS THAT WERE SUBJECT TO A SEARCH WARRANT, WE DECIDED TO SEEK ANOTHER SEARCH WARRANT TO RECOVER THE DOCUMENTS FROM COUNSEL.

IT IS OUR POSITION THAT THE MERE FACT THAT SHE HAS TURNED THE DOCUMENTS OVER TO HER COUNSEL DOES NOT CHANGE THE NATURE OF THE DOCUMENTS.

THEY WERE EVIDENCE OF A CRIME BEFORE AND THEY ARE EVIDENCE OF A CRIME NOW.

JUDGE POUNDERS AGREED. AND THIS MORNING JUDGE POUNDERS ISSUED A SEARCH WARRANT FOR THE DOCUMENTS.

NOW, THE ORIGINAL DRAFT OF THE SEARCH WARRANT THAT I HAD DRAFTED THIS MORNING IDENTIFIED THREE LOCATIONS TO BE SEARCHED.

ONE WAS THE LAW OFFICE OF MR. GABBERT, THE SECOND LOCATION WAS HIS PERSON AND BRIEFCASE AND THE THIRD WAS THE PERSON OF TRACI BAKER.

AS THAT WAS BEING PREPARED FOR JUDGE POUNDERS' SIGNATURE, I SAW MR. GABBERT IN THE HALLWAY AND I INQUIRED OF HIM WHETHER HE HAD BROUGHT THE DOCUMENTS WITH HIM.

HE INDICATED TO ME THAT HE HAD, IN FACT, BROUGHT THE DOCUMENTS WITH HIM.

THAT BEING THE CASE, I DECIDED NOT TO MAKE THE SEARCH WARRANTS ANY BROADER

THAN NECESSARY, SO I AMENDED THE WARRANTS TO INCLUDE ONLY THE PERSON OF MR. GABBERT AND THE PERSON OF TRACI BAKER.

THAT IS, IN FACT, THE SEARCH WARRANT THAT WE PRESENTED TO JUDGE POUNDERS; AND, ONCE AGAIN, HE SIGNED [p. 42] THAT SEARCH WARRANT TODAY.

FOLLOWING THE ISSUANCE OF THAT SEARCH WARRANT, WE BROUGHT A SPECIAL MASTER AND REQUIRED MR. GABBERT TO OPEN HIS BRIEFCASE AND REVEAL THE CONTENTS OF HIS BRIEFCASE FIRST TO THE SPECIAL MASTER AND THEN TO THE INVESTIGATING OFFICER, WHICH HE DID.

AFTER IT WAS SHOWN AND THE DOCUMENTS WERE STILL NOT PRODUCED, I INQUIRED OF COUNSEL, WAS IT NOT THE CASE THAT HE HAD TOLD ME THIS VERY MORNING THAT HE HAD THE DOCUMENTS THAT WE WERE SEEKING ON HIS PERSON.

HE SUGGESTED THAT IT WAS A MISUNDERSTANDING ON MY PART; THAT HE NEVER CLAIMED THAT THE DOCUMENTS WERE ON HIS PERSON.

AT THIS POINT, WHAT WE DID WAS WE ONCE AGAIN REWROTE THE SEARCH WARRANT, BROUGHT IT TO JUDGE POUNDERS AND IT'S MY UNDERSTANDING THAT JUDGE POUNDERS HAS NOW SIGNED THAT SEARCH WARRANT.

SO THE DOCUMENTS WE ARE SEEKING IS PROPERLY SUBJECT TO SEIZURE PURSUANT TO A SEARCH WARRANT, AND WE INTEND AT THIS TIME TO GO

OUT TO COUNSEL'S OFFICE AND SEE THE DOCUMENTS AT HIS OFFICE.

AS I SAID, PROPERLY SPEAKING, THAT IS NOT THE ISSUE BEFORE THE COURT.

THE ISSUE BEFORE THE COURT IS THE CONTEMPT, AND I WOULD ASK THAT THE COURT EITHER FIND HER IN CONTEMPT AT THIS TIME OR THE COURT CAN HOLD THAT RULING IN ABEYANCE UNTIL WE HAVE HAD AN OPPORTUNITY TO GO TO COUNSEL'S OFFICE AND GET THE DOCUMENTS.

[p. 43] AND ONCE WE HAVE THOSE DOCUMENTS IN OUR POSSESSION, WE HAVE NO INTEREST IN HOLDING THIS WITNESS IN CONTEMPT ANY LONGER.

THE COURT: ALL RIGHT.

MR. GABBERT?

MS. NAJERA: SOME, PERHAPS MOST, OF WHAT COUNSEL HAS SAID APPEARS TO BE ACCURATE, ALTHOUGH I DON'T THINK THE DOE CASE IS CONTROLLING.

MOVING BACK A DAY, TO GIVE THE COURT THE PROSPECTIVE OF WHY WE ARE HERE AND WHY WE ARE PURSUING SIMULTANEOUSLY TWO LEGAL AVENUES WHICH MAY OR MAY NOT BE AN ABUSE OF THE GRAND JURY PROCESS:

I MADE ARRANGEMENTS WITH COUNSEL TO HAVE MISS BAKER SERVED IN MY OFFICE ON THE AFTERNOON OF LAST THURSDAY SO SHE COULD

RECEIVE THE SUBPOENA TO ATTEND THE GRAND JURY ON MONDAY.

MR. ZOELLER GOT THERE IN THE AFTERNOON AND SERVED HER.

WHEN I LOOKED AT THE SUBPOENA, THE SUBPOENA ASKED HER TO PRODUCE DOCUMENTS - AND I'M PARAPHRASING; I'M NOT READING OFF THE DOCUMENT RIGHT NOW - THAT SAID, "ALL CORRESPONDENCE OR ANY CORRESPONDENCE FROM LYLE MENENDEZ."

ALTHOUGH I ONLY KNOW THIS FROM WHAT I HAVE READ IN THE PAPER, SORT OF, IT APPEARS THAT THERE WAS A LETTER THAT SOMEONE GOT TO DOMINIC DUNN THAT PURPORTS TO BE FROM LYLE MENENDEZ AND IS WRITTEN TO A TRACI.

AND IT DISCUSSES - APPEARS TO DISCUSS PORTIONS OF HER TESTIMONY AT THE PREVIOUS TRIAL.

[p. 44] I WAS PROVIDED WITH A COPY, A POOR PHOTOSTAT OF THAT COPY OF THAT DOCUMENT BY A SOURCE OTHER THAN MY CLIENT, WHICH I PROVIDED TO THE SPECIAL MASTER AND COUNSEL WHEN THE WARRANT WAS EXECUTED TODAY.

WHEN I GOT THE SUBPOENA, I DID SOME RESEARCH.

I CALLED MR. CONN ON THE FOLLOWING MORNING AND I SAID, "I BELIEVE THE ACT OF PRODUCTION IS TESTIMONIAL AND COMPELLED AND PROTECTED BY THE FIFTH AMENDMENT, AND I'M GOING TO BRING A MOTION TO QUASH THE SUBPOENA AS TO THAT PORTION."

AND I SAID, "SHALL WE CONTINUE THE HEARING SO THERE WILL BE TIME FOR THIS?"

AND HE SAID, "NO."

I CALLED HIM BACK AND SAID, "WELL, TO GET THIS HEARD BEFORE MONDAY" - BECAUSE IT WAS NOW FRIDAY - "I NEED AN APPLICATION FOR AN ORDER SHORTENING TIME THAT I WILL BRING INTO DEPARTMENT 100.

"I ASSUME YOU WILL OPPOSE IT," OR ASKED HIM IF HE OPPOSED IT.

AND HE SAID HE OPPOSED IT.

I HAD THE DOCUMENTS PREPARED, WHICH ARE NOW BEFORE YOU AND I SENT THEM DOWN TO DEPARTMENT 100 THAT AFTERNOON. AND, UNBEKNOWNST TO ME, THEY WERE GETTING A SEARCH WARRANT, APPARENTLY.

THERE WAS NOBODY IN DEPARTMENT 100; THEY WOULDN'T FILE THE DOCUMENTS.

I DID A LITTLE SHOPPING OVER THE PHONE, MY MOBILE PHONE, TRYING TO FIND A JUDGE.

[p. 45] I TALKED TO THE CRIMINAL COURT'S COORDINATOR, MR. IVERSON.

HE FOUND ME JUDGE BASCUE.

I HAD MY RUNNER SUBMIT THE APPLICATION, FEDERAL AUTHORITIES AND MOTION BEFORE HIM, ASKING HIM TO SIGN THE ORDER SHORTENING TIME SO THIS MATTER COULD PROCEED IN AN ORDERLY WAY WITH EACH SIDE HAVING AN

OPPORTUNITY TO ADDRESS THE ISSUE SO WE WOULDN'T HAVE A CONTEMPT PROCEEDING AND SO THAT - IT DIDN'T DAWN ON ME, I HAVE TO SAY.

IT WAS AN EXAMPLE OF A LACK OF FORESIGHT ON MY PART TO THINK THEY WOULD DO BOTH THINGS SIMULTANEOUSLY.

I THINK IT'S INAPPROPRIATE, BUT I THINK IT'S INAPPROPRIATE TO ARGUE IT BECAUSE I DIDN'T BRIEF IT.

JUDGE BASCUE DENIED THE EX PARTE APPLICATION FOR THE ORDER SHORTENING TIME.

I HAVE A COPY OF WHAT HE DID THAT I CAN PRESENT TO YOU SO YOU CAN SEE HIS REASON.

I PREVIOUSLY SHOWED IT TO COUNSEL THIS MORNING, WHEN COUNSEL MADE THE COMMENT TO THE EFFECT ABOUT BRINGING PAPERS, BECAUSE I HAD A VERY THICK FILE.

I THOUGHT HE WAS REFERRING TO THE MOTIONS AND THE DOCUMENTS THAT I TOLD HIM I WAS BRINGING ON FRIDAY WHICH I COULDN'T GET ANYBODY TO FILE.

NEVER IN MY WILDEST DREAMS DID I THINK HE THOUGHT I WAS BRINGING DOCUMENTS WHICH MAY OR MAY NOT EXIST TO THE GRAND JURY, THEREBY WAIVING THE ATTORNEY-CLIENT PRIVILEGE AND RENDERING MOOT THE FIFTH AMENDMENT OBJECTION.

[p. 46] I SUBMIT TO YOU, ALTHOUGH I DON'T THINK I HAVE HAD THE PLEASURE OF APPEARING

BEFORE YOU BEFORE, THAT THAT'S NOT SOMETHING I WOULD DO, BECAUSE IT MAKES NO SENSE.

SO THEY THEN PROCEEDED TO TAKE MY CLIENT INTO THE GRAND JURY, AND I WENT WITH THE SPECIAL MASTER TO BE SEARCHED, WHEREUPON I PRODUCED THE TWO-PAGE COPY OF WHAT PURPORTS TO BE THE LETTER FROM LYLE MENENDEZ TO MISS BAKER.

THEN COUNSEL RELATED THE SUBSEQUENT SEARCH BY MR. ZOELLER AS WELL.

I WAS THEN FACED WITH THE PROBLEM OF HAVING MY CLIENT BE QUESTIONED ABOUT WHETHER SHE HAD PRODUCED DOCUMENTS, WHICH AN ANSWER TO WOULD ADMIT THEIR EXISTENCE, WHICH WAS ONE OF THE GROUNDS FOR BRINGING THE MOTION.

IT WOULD ALSO ACKNOWLEDGE HER CUSTODY AND CONTROL, WHICH WAS A SECOND GROUND FOR BRINGING THE MOTION UNDER THE ACT OF THE PRODUCTION DOCTRINE, AND IT COULD AUTHENTICATE THE DOCUMENTS, WHICH WAS THE THIRD GROUND.

SO, IN ANSWER TO A QUESTION, IT WOULD CONSTITUTE A WAIVER, PROBABLY, OF THE - CERTAINLY OF THE FIFTH AMENDMENT PRIVILEGE AND, IF APPLICABLE, THE ATTORNEY-CLIENT PRIVILEGE.

SO THE ONLY THING I COULD TELL MISS BAKER TO DO UNDER THE CIRCUMSTANCES CREATED EXCLUSIVELY [sic] BY THE PEOPLE AT THE OTHER

END OF THE TABLE WAS TO ADVISE HER TO TAKE THE FIFTH AMENDMENT, WHICH I DID.

NOW WE'RE BEFORE YOU, AND PROBABLY THEY ARE [p. 47] SEARCHING MY OFFICE.

THE COURT: DO YOU WANT TO RESPOND, MR. CONN?

MR. CONN: YES.

AS I SAID, AS FAR AS PROCEEDING BOTH WAYS SIMULTANEOUSLY, THAT IS, THE WITNESS WAS ORDERED TO APPEAR BEFORE THE GRAND JURY AND TO PRODUCE THE DOCUMENTS AND, AT THE SAME TIME, WE DID OBTAIN A SEARCH WARRANT.

THIS WAS SOMETHING THAT WE FULLY BRIEFED JUDGE POUNDERS ON, SO JUDGE POUNDERS WAS AWARE OF THE FACT THAT THERE WAS AN ONGOING GRAND JURY HEARING AT THE TIME HE ISSUED THE SEARCH WARRANT.

AND I AGREE, THERE IS AN INVESTIGATING OFFICER AT THIS TIME EN ROUTE TO SEARCH HIS OFFICE.

SO I THINK, PERHAPS, THE SIMPLEST SOLUTION WOULD BE THE COURT CAN DELAY OR SUSPEND ANY RULING ON THIS MATTER UNTIL THE OFFICER HAS HAD TIME TO RECOVER THE DOCUMENTS FROM THE SANTA MONICA OFFICE OF COUNSEL IF HE DOES, IN FACT, RECOVER THE DOCUMENTS.

AND I THINK THIS ISSUE WILL BE MOOT BECAUSE, AS I SAID, WE ARE NOT ASKING THAT

THE WITNESS BE HELD IN CONTEMPT IF WE DO, IN FACT, GET THE DOCUMENTS.

I UNDERSTAND SHE TURNED THOSE OVER TO HER ATTORNEY AND WAS ACTING UNDER ADVISE [sic] OF COUNSEL.

IF WE DO NOT RECOVER THE DOCUMENTS, THEN I THINK WE WILL BE FACED ONCE AGAIN WITH THE ISSUE OF CONTEMPT.

MR. GABBERT: MAY I ASK TWO POINTS?

FIRST OF ALL, AT THE TIME MY CLIENT PURPORTEDLY [p. 48] MADE THE STATEMENT THAT SHE HAD TURNED THE DOCUMENTS OVER TO HER COUNSEL, SHE WAS KNOWN TO BE REPRESENTED BY COUNSEL.

MR. ZOELLER KNEW THAT; BOTH DEPUTY DISTRICT ATTORNEYS KNEW THAT.

THEY KNEW BECAUSE THEY HAD SOUGHT MEETINGS WITH MY CLIENT, THOUGH THEY WERE NOT GOING TO BE TALKING TO HER ABSENT A GRANT OF IMMUNITY.

WHEN THEY EXECUTED THE WARRANT, THEY PROCEEDED TO QUESTION MY CLIENT IN A SITUATION THAT IF IT IS NOT LITERALLY CUSTODIAL, CERTAINLY IT HAS MANY OF THE TRAPPINGS.

BECAUSE I THINK WHEN YOU HAVE TWO DEPUTIES DISTRICT ATTORNEY AND TWO POLICE OFFICERS IN YOUR BEDROOM ON A FRIDAY EVENING, THAT'S A FAIRLY COERCIVE CIRCUMSTANCE. AND I

DON'T KNOW THAT ANYONE WOULD FEEL FREE TO LEAVE.

NOW, I HAVEN'T BRIEFED THE ISSUE OF WHETHER THE RIGHT TO COUNSEL ATTACHED, BECAUSE IT IS A PRE-INDICTMENT SITUATION. AND THE FEDERAL RULE IS NO EXCEPTION WHEN IT DOES.

I HAVEN'T LOOKED AT THE STATE RULE ON IT, BUT IT'S CLEAR TO ME THAT THERE SHOULD HAVE BEEN NO QUESTIONING OF MY CLIENT.

THEY HAD BEEN TOLD NOT TO DO THAT, AND CERTAINLY WITH RESPECT TO THE DISCIPLINARY RULES OF THE STATE BAR, THE COMMUNICATION WITH A REPRESENTED PARTY IS FORBIDDEN.

[p. 49] SO IF SHE MADE THOSE STATEMENTS, I CLEARLY DON'T THINK THEY ARE VOLUNTARY AND I DON'T THINK THEY WOULD CONSTITUTE A WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE, AND I DON'T THINK THEY SHOULD CONSTITUTE ANY TYPE OF ADMISSION ON HER BEHALF BECAUSE OF THE CONTEXT IN WHICH THEY WERE MADE.

ALSO, IF THE COURT DOES WHAT COUNSEL SUGGESTS, YOU WILL BE SAYING, IN EFFECT, ALTHOUGH I DON'T KNOW THAT YOU WOULD AGREE, DE JURE, BUT DE FACTO, THAT EVERYTHING THEY HAVE DONE IS JUST FINE AND THIS IS HOW WE OUGHT TO CONDUCT OUR GRAND JURIES IN LOS ANGELES COUNTY.

AND IF YOU DON'T DO WHAT WE SAY, WE GET SEARCH WARRANTS FOR EVERYWHERE, AND

THERE IS NO REASON TO HAVE COUNSEL, TO PREPARE MOTIONS, TO QUASH SUBPOENAS THAT COULD BE INCRIMINATING IN THE ABSENCE OF IMMUNITY.

AND THE DUE PROCESS CONSIDERATIONS THAT ARE INHERENT IN THE PRE-INDICTMENT CONTEXT HAVE NO APPLICATION.

AND THE FACT THAT IN AN EX PARTE - IN ANOTHER EX PARTE PROCEEDING A PROSECUTOR HAS PERSUADED ANOTHER JUDGE OF THIS COURT THAT WHAT THE CONTENTS OF THE OBJECTS HE SEEKS TO FIND, THE EXISTENCE OF WHICH HE DOES NOT KNOW, ARE SUCH THAT HE CAN CIRCUMVENT THE DISPOSITION OF THIS MATTER IN A COURT OF LAW AND RESULT TO THE SEARCH WARRANT PROCESS BOTH TO MY CLIENT, AS TO MY PERSON, MY BRIEFCASE AND MY EFFECTS, MY OFFICE.

I SUBMIT TO YOU THAT I DON'T THINK THAT'S APPROPRIATE. I THINK WE SHOULD HAVE A RULING ON THIS ISSUE.

[p. 50] THE RULING MAY RENDER THE WHOLE MATTER MOOT, SO RATHER THAN DO NOTHING, AS COUNSEL WOULD HAVE YOU DO, AND GIVE THE IMPRIMATUR OF APPROVAL OF THE PROCEDURE, I WOULD ASK THE COURT TO RULE ON THE ISSUES THAT I COULD IN GOOD FAITH - COULD NOT GET ANYONE TO FILE, MUCH LESS HEAR, BEFORE THE WHOLE SITUATION WAS CREATED.

THE COURT: WELL, AS FAR AS THE PROCEEDINGS THAT I'M HEARING ABOUT, WHILE THEY

ARE UNUSUAL, I DON'T BELIEVE THERE IS ANYTHING IMPROPER THAT'S HAPPENING HERE.

BECAUSE I THINK JUDGE POUNDERS CERTAINLY COULD HAVE PROPERLY FOUND THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT THESE LETTERS, IF THEY EXIST, ARE EVIDENCE OF A CRIME COMMITTED BY LYLE MENENDEZ.

SO WE REALLY HAVE TWO SEPARATE PROCEEDINGS GOING.

I WILL STATE FOR THE RECORD, WHEN I CALLED THE ATTORNEY, THE GRAND JURY ADVISOR, INTO THE CHAMBERS ON RECORD, MY QUESTION TO HIM WAS, "IS THIS A GRAND JURY PROCEEDING SEEKING AN INDICTMENT AGAINST MISS BAKER?"

AND I WAS TOLD, "THIS IS A GRAND JURY INVESTIGATION AND NO INDICTMENT IS BEING SOUGHT NOW."

ON THE OTHER HAND, IT CERTAINLY APPEARS THAT AN INDICTMENT IS A POSSIBILITY AGAINST MISS BAKER BASED ON WHAT IS UNCOVERED BY THE GRAND JURY AND AS A RESULT OF THIS INVESTIGATION.

BUT CLEARLY THE PROSECUTION IS INTERESTED IN TWO SEPARATE THINGS:

ONE IS EVIDENCE AGAINST MR. MENENDEZ; AND,

[p. 51] THE OTHER MAY BE EVIDENCE AGAINST MISS BAKER.

I'M PROBABLY NOT GOING TO SATISFY ANYBODY VERY MUCH BECAUSE I'M NOT PREPARED TO RULE ON THE FIFTH AMENDMENT ISSUE SIMPLY BECAUSE WHETHER PRODUCTION OF DOCUMENTS IS THE INCRIMINATING EVENT, I HAVE NOT READ ANY OF THESE NICE FEDERAL CASES.

MY PRELIMINARY REACTION TO IT IS IT'S PROBABLY AN ISSUE THAT RAISES PRIVILEGE AND PROBABLY THE FIFTH AMENDMENT APPLIES AND THAT SHE WOULD BE ENTITLED TO A GRANT OF IMMUNITY BEFORE SHE COULD BE COMPELLED TO PRODUCE THESE DOCUMENTS.

I THINK THE PRODUCTION OF THE DOCUMENTS BY HER BOTH ACKNOWLEDGES THEIR RECEIPT BY HER.

THERE IS NO WAY SHE COULD COME INTO POSSESSION OF THESE LETTERS, I'M SURE, UNLESS LYLE WOULD HAVE MAILED THEM TO HER AND ALSO AUTHENTICATES THEM.

AND I THINK THAT'S INCRIMINATING.

THAT'S JUST MY THRESHOLD OPINION, AND I HAVE CHANGED MY MIND BEFORE WITH THE ASSISTANCE OF RESEARCH. BUT THAT'S WHERE I THINK WE ARE.

BUT THIS MAY BE ACADEMIC.

IF, IN FACT, THE DOCUMENTS ARE RECOVERED BY SEARCH WARRANT, THEN THE PEOPLE MAY HAVE NO FURTHER INTEREST IN EITHER TESTIMONY OR DOCUMENTS FROM MISS BAKER.

SO I'M GOING TO TAKE IT UNDER SUBMISSION TO GIVE ME AN OPPORTUNITY TO DO THE RESEARCH.

I THINK WHAT I'D BEST DO IS RESCHEDULE IT AND GIVE YOU A RETURN DATE RATHER THAN WAIT TO HEAR FROM YOU.

[p. 52] AND IF, IN FACT, IT WORKS OUT, YOU CAN LET ME KNOW AND WE CAN TAKE IT OFF CALENDAR.

WHAT DO YOU THINK, IN TERMS OF TIME?

WHEN DO YOU THINK YOU'LL KNOW WHETHER A SEARCH WARRANT PRODUCED THE INFORMATION YOU NEED?

MR. CONN: PERHAPS WEDNESDAY.

WE ARE GOING TO BE APPEARING ON THE SAME CASE IN ANOTHER COURT TOMORROW.

WE WOULD ASSUME BY WEDNESDAY WE WILL KNOW WHAT THE SEARCH WARRANT REVEALED.

THE COURT: MAYBE THE AFTERNOON WOULD BE EASIER FOR ME. THAT WOULD GIVE ME PLENTY OF TIME.

LET ME TRAIL THIS, THEN, TO WEDNESDAY, MARCH 14, AT 1:30.

MR. CONN: MISS NAJERA POINTED OUT - WOULD IT BE POSSIBLE TO DO IT ON THURSDAY?

IS THAT ALL RIGHT WITH EVERYBODY?

MR. GABBERT: THURSDAY AFTERNOON?

MR. CONN: OR MORNING, ACTUALLY.

MR. GABBERT: I CAN'T DO IT THURSDAY AFTERNOON.

I COINCIDENTALLY HAVE ANOTHER CLIENT BEFORE A FEDERAL GRAND JURY ON THURSDAY MORNING IN A TOTALLY UNRELATED MATTER.

THE COURT: THAT'S AN UNUSUAL SPECIALTY, BUT THERE YOU ARE.

IS THURSDAY MORNING ALL RIGHT?

MR. GABBERT: THURSDAY MORNING IS WHEN I HAVE TO BE THERE.

[p. 53] SO, FOR ME, IT WOULD HAVE TO BE THURSDAY AFTERNOON.

THE COURT: THAT'S FINE.

THURSDAY AT 1:30?

THE CLERK: MARCH 24.

THE COURT: I THOUGHT TODAY WAS THE 12TH.

I'M A LITTLE CONFUSED.

MARCH 24.

ALL RIGHT.

MISS BAKER, UNLESS YOUR ATTORNEY INSTRUCTS YOU OTHERWISE, COME BACK TO THIS COURT ON THURSDAY, MARCH 24, AT 1:30.

MR. WHITE: I WOULD ASK THE COURT TO ADMONISH COUNSEL THAT THE GRAND JURY PROCEEDING - AND THIS IS A GRAND JURY PROCEEDING - IS CONFIDENTIAL AND THAT HE IS LIABLE UNDER THE PENALTY OF PERJURY - EXCUSE ME - UNDER CONTEMPT OF COURT IF HE REVEALS ANYTHING THAT OCCURED [sic] DURING THIS HEARING OR IF HE DOES BEFORE THE GRAND JURY -

MR. GABBERT: I HAVE ONE QUESTION THAT'S NOT CLEAR IN MY MIND.

I HAD RICHARD HIRSCH AND HIS PARTNER COME DOWN BECAUSE IN NEARLY 17 YEARS I HAD NEVER BEEN THE SUBJECT OF A SEARCH WARRANT. AND I THOUGHT IT WOULD BE APPROPRIATE IF I WERE REPRESENTED BY COUNSEL.

SO I'M NOT CLEAR WHETHER I CAN COMMUNICATE WITH MY COUNSEL ABOUT WHAT WENT ON IN HERE TODAY.

IT WOULD SEEM TO ME I COULD.

THE COURT: IF THE PEOPLE DISAGREE, THEY CAN SAY SO.

[p. 54] I THINK YOU CAN COMMUNICATE WITH YOUR ATTORNEYS ABOUT ANYTHING CONCERNING THE SEARCH WARRANT BUT NOT ABOUT ANY GRAND JURY TESTIMONY THAT WAS REQUIRED OF YOUR CLIENT OR DOCUMENTS THAT WERE REQUIRED BY THE GRAND JURY.

BUT ANYTHING REGARDING YOU AND THE SEARCH, YOU ARE FREE TO TALK TO YOUR ATTORNEYS.

MR. GABBERT: THANK YOU.

THE COURT: DO YOU HAVE ANY PROBLEM WITH THAT?

MR. CONN: NO, YOUR HONOR.

MR. GABBERT: I HAVE ONE FURTHER REQUEST. I'M SURE IT WON'T BE A PROBLEM.

IF I CAN JUST GET THESE DOCUMENTS STAMPED FILED, I WOULD BE VERY HAPPY.

THE COURT: WE CAN MARK THEM "RECEIVED," BUT THERE IS NO CASE NUMBER AND THERE IS NO CASE IN WHICH TO FILE THEM.

BUT WE WILL INDICATE ON YOUR COPIES THAT THEY WERE RECEIVED BY THIS COURT TODAY.

MR. GABBERT: THANK YOU.

THE COURT: THANK YOU.

(THE PROCEEDINGS WERE CONCLUDED.)

THE GRAND JURY OF THE COUNTY
OF LOS ANGELES
STATE OF CALIFORNIA

IN RE THE GRAND JURY)
INVESTIGATION) CASE NO.
(SECRET)) (NONE)
WITNESS: TRACI LE BAKER.)
_____)

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) SS.
_____)

I, RICHARD B. COLBY, CSR, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1-54, INCL., COMPRISES A FULL, TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS REPORTED BY ME ON MARCH 21, 1994 IN THE ABOVE-ENTITLED MATTER.

DATED THIS 27TH DAY OF MARCH 1995.

/s/ Richard B. Colby CSR 1080
OFFICIAL REPORTER

EXHIBIT 3

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	No. CV 94-4227
	)	RSWL (Ex)
Plaintiff,)	
)	
vs.)	
)	
DAVID CONN, CAROL)	
NAJERA, ELLIOT OPPENHEIM,)	
LESLIE ZOELLER and DOES 1)	
through X,)	
)	
Defendants.)	
_____)	

Deposition of PAUL L. GABBERT, taken on behalf of Defendants, at 648 Kenneth Hahn Hall of Administration, 500 West Temple Street, Los Angeles, California 90012, commencing at 1:10 P.M. on Tuesday, the 4th day of April, 1995, before ELIZABETH A. HINES, CSR No. 9236, pursuant to Notice.

Reported by: ELIZABETH A. HINES, CSR No. 9236

Job No.: 95-0404EAH

* * *

[p. 33] Amendments and the attorney-client privilege.

Q. BY MR. BRAZILE: How did you even find that there had been a search conducted on her home prior to March 21, 1994?

MR. LIGHTFOOT. Same assertion.

Q. BY MR. BRAZILE: Do you know if anything was taken from her home as a result of the search of her home that occurred before March 21st, 1994?

MR. LIGHTFOOT: Same objection. Same assertions on the same grounds.

Q. BY MR. BRAZILE: Had you ever represented Ms. Baker before in any legal matters prior to February 11th, 1994?

(Whereupon, a discussion was held between the deponent and his counsel out of the hearing of the reporter.)

THE WITNESS: No.

Q. BY MR. BRAZILE: All right. Are you still representing Ms. Baker as of today?

A. Yes.

Q. On March 21st, 1994 you appeared in the downtown Los Angeles Criminal Courts building with Ms. Baker; is that correct?

A. Yes, sir.

Q. What time did you get there?

[p. 34] A. To the Criminal Courts building itself?

Q. Correct.

A. Between 7:00 and 8:00 a.m.

Q. Did you arrive alone or with someone?

A. I arrived alone.

Q. And did you meet Ms. Baker sometime that morning?

A. I did.

Q. When? What time?

A. Approximately 7:30 a.m.

Q. Did you meet her at the courthouse itself or in the parking lot or some other location?

A. In the courthouse.

Q. Did she arrive by herself or did she come with someone?

A. I don't know.

Q. Where in the courthouse did you meet her?

A. I believe I met her on the 13th floor where the grand jury room is located.

Q. And had this been your first time to represent someone who had to testify before the grand jury?

A. No.

Q. How many occasions prior to March 21st, 1994 had you represented someone who had to appear and testify before the L.A. County grand jury?

[p. 35] A. Oh, before the L.A. County grand jury, it may very well have been the first representation of a witness before the L.A. County grand jury.

Q. How many times prior to March 21st, 1994 had you represented someone who had to testify before any grand jury?

A. I would guess probably a dozen, maybe more.

Q. Was it your understanding when Ms. Baker testified before the grand jury that you would not be allowed to be in the grand jury hearing?

A. Yes.

Q. You knew that; correct?

A. Yes.

Q. What was your understanding as to where you would be when she was actually in the grand jury hearing room testifying?

A. Outside of it.

Q. Where outside of it?

A. In a waiting area, depending upon the particular physical layout of the Los Angeles County grand jury for that time period.

Q. Had that been the first time that you had gone up to the L.A. County grand jury where the grand jury room is located? Did you know the layout prior to March 21, 1994?

[p. 36] A. Well, I knew the 13th floor, and I think I have been in the grand jury sort of entryway although I can't recall when. I did not - I was not familiar with the layout of the various rooms. It wasn't familiar to me on March 21, 1994. I think I have been in there before. I don't remember when and it wasn't familiar to me.

Q. When a witness is going to testify before the grand jury, they have to check in with the bailiff; is that correct?

A. Yes. Correct.

Q. What time did Ms. Baker check in with the bailiff?

A. I think we actually checked in before her appointed time, which was either 8:00, 8:30, I believe. I think we checked in probably around 8:25, if I'm correct that it was 8:30.

Q. Did she check in with the bailiff?

A. I think I checked in for her. I don't recall whether she was by my side or in the hall at the time I checked her in.

Q. Who was present when you checked her in?

A. Either myself and the bailiff or myself, the bailiff and Ms. Baker.

Q. Anyone else?

A. There may have been other clerical personnel [p. 37] behind the counter, but I don't remember anybody in the immediate vicinity of the bailiff's desk.

Q. Where was the bailiff's desk located in relation to the grand jury hearing room?

A. It's in an anteroom or a waiting room area. It has a little desk.

Q. And when you checked in with the bailiff, did he have to check Ms. Baker's name off of a list of some kind?

A. Probably. I don't recall.

Q. Okay.

A. He seemed - my recollection is that it registered.

Q. Did he mark it down on a piece of paper, log it in in some way?

A. He may have. I think so. I don't remember.

Q. What happened after you checked her in?

A. We went outside to wait in the hallway.

Q. And what happened after you went outside into the hallway?

A. Sometime after we were waiting outside, sitting on a bench, Ms. - I believe Mr. Conn and Ms. Najera showed up.

Q. Then what happened?

A. I think we said, "Good morning," where there

* * *

[p. 50] recollection. I mean the subpoena says what it says, but he might not have shown up until 9:30. I think it's probably close to 10:00. Between 9- - I think it's between 9:30 and 10:00, but I could be off.

Q. When the two of you get back to the 13th floor, where do you go, you and Ms. Baker?

A. We stood around by the grand jury.

Q. For how long?

A. Until - until Mr. Conn, Ms. Najera and, I think some other people came back down.

Q. What time was that?

A. I don't recall.

Q. Give me your best estimate.

A. It's around - I think it was probably about - I don't know - 15 minutes later.

Q. Before 10:30 or after 10:30?

A. I think it was before 10:30.

Q. What happens when these other individuals come back?

A. Conn came down. I think Najera came down, and I think, I'm not sure, if Oppenheim - and I didn't know who Oppenheim was, but this fellow dressed in blue. Conn's secretary, I think, came down.

Conn came up to me, and I said - I don't know everything that was said, but the question by me was: [p. 51] "Where's the letter?"

Q. What did he say?

A. "It's still being typed up."

Q. What else was discussed?

A. That's all I remember.

Q. You don't recall him saying anything else at that point?

A. No.

Q. Did you say anything else to anyone at that point in time?

A. I might have looked at Ms. Baker and shrugged.

Q. What happened next?

A. I think Mr. Conn went in through the outer doors to the grand jury. I think Ms. Najera followed. If the other two people - the secretary and Oppenheim - came down, they went through the doors. I think either Ms. Baker and I followed or somebody came out and said - called Ms. Baker before the grand jury.

Ms. Baker needed to go to the bathroom and stated that. She then went to the bathroom, and if we were inside the grand jury anteroom or waiting room, we walked outside so she could go to the bathroom.

I was standing in the hall. Ms. Najera came out, stood in the hall with me and attempted to make some small talk with me.

[p. 52] Q. All right. Now, where was Ms. Baker at this point in time?

A. I presume in the ladies room.

Q. All right. Then what happened?

A. Ms. Baker returned from the ladies room. Ms. Najera, Ms. Baker and I went into the anteroom of the grand jury. And while we were standing there, Detective Zoeller came up and said, "Good morning, Mr. Gabbert."

Q. Where was Ms. Baker when Detective Zoeller came in and said good morning to you?

A. I believe she was standing adjacent to me.

Q. And where was your briefcase and your accordion file at that time?

A. I don't remember whether I was holding them or whether I had set them down on a conference table or a table in the anteroom.

Q. Now, this anteroom that you have testified to, is that also known as the witness room that was adjacent to the grand jury room?

A. I don't remember the name of it. It may have been the witness room.

Q. Was it the room where the bailiff was stationed?

A. Yes.

Q. What happened next?

[p. 53] A. I said, "Good morning, Detective Zoeller."

Q. Was the bailiff in that room at that time?

A. I don't remember. His desk was there. He was there most of the time. He may have been -

Q. What happens next?

A. Detective Zoeller then presented me with a search warrant, served a search warrant on me for my briefcase my person and Ms. Baker's person.

Q. What happens next?

A. I don't know if this is a precise chronology, but within seconds Ms. Baker was called before the grand jury.

Q. Who called her before the grand jury?

A. I don't know whether it was the foreperson or Mr. Conn. I was introduced to Mr. Oppenheim, who was the special master.

I said, "We'll need a private room." First I read the warrant. I was a little surprised. I was quite surprised and -

Q. Were you angry?

A. Absolutely.

When I said, "We'll need a private room," someone said, "We have one."

Q. Do you know who that was, who said, "We have one"?

[p. 54] A. No. I don't recall who it was. And I was led away to the room with Mr. Oppenheim. And Ms. Baker either shortly before or simultaneously was taken before the grand jury.

Q. Now, did you see Ms. Baker taken before the grand jury at that point?

A. I don't - I think I saw her pass out of my view. I don't remember if I literally saw her go through the door or not.

Q. All right. So -

A. And I may have said, "I want to call my attorney," at that point. Which if I said it, then it was denied.

Q. And who was your attorney that you wanted to call?

A. I wanted to call Michael Nasatir.

Q. As you were taken away to a private room, where was Ms. Baker? Could you see her?

A. I believe Ms. Baker - the last time I saw Ms. Baker, she was standing by this table and she was either on her way into the grand jury - I think she was on her way into the grand jury the last time I saw her.

Q. Prior to leaving with Mr. Oppenheim, the special master, for the search, did you ever see Ms. Baker actually enter the grand jury hearing room?

[p. 55] A. I don't recall if I saw her in motion or passing through a door. I think she was on her way in.

Q. But isn't it true you never saw her enter the grand jury hearing room?

A. I don't recall. I may have seen her enter the grand jury - I mean, may have seen her going through the doors, but this was all happening at once. And I have an image of her going into the door, but I'm not certain about it.

Q. And this door, which door are you referring to?

A. The door that was literally into the grand jury room.

Q. Did anyone escort her towards that door?

A. The foreperson may have. There were a lot of people there at that - you know, standing around that table. And my - I was distracted and my attention was divided.

Q. So, after you were escorted out of the room, where are you taken?

A. I'm taken into an office space.

Q. And who goes into this office with you?

A. Mr. Oppenheim.

Q. Anyone else?

A. No.

[p. 56] Q. What happens once you get into this office room?

A. I told Mr. Oppenheim, among other things, that the only thing that I had in my possession, meaning on my person or in my briefcase, that was responsive to the search warrant, was two photocopied pages - I believe it was two pages of a letter that was supposedly three pages in length that was purportedly written from Lyle Menendez to Tracy Baker. And that the prosecution already had that letter. Mr. Oppenheim kept taking the search warrant and reading it. He must have read the search warrant on numerous occasions. He then said - directed me to permit him to search my briefcase.

Q. What did you say?

A. I produced this letter. I told him that, "This was all there was. Did he still want to search?"

He said, "Yeah."

So I started - I told him that I had privileged documents, files, pertaining to Ms. Baker and other clients.

Q. In the briefcase or the accordion file?

A. I had two files pertaining to other clients in the briefcase. I had Ms. Baker's file in the accordion file. As I stated previously, I may have had one of Ms. Baker's files

in the briefcase. I can't recall if it [p. 57] was in the briefcase or the accordion.

He directed me, "Go ahead, I want to search even though notwithstanding what you said."

I then started to take items out of my briefcase. Sometime while this was happening, I was told that my client wanted to speak to me.

Q. Who told you that?

A. I believe it was Mr. Conn's secretary, the lady in pink. And there was, like, a knock on the door, and then the door opened, and she said this to me.

And I said, words to the effect, "I can't talk to Ms. Baker now. It will have to wait. I'm being searched."

Q. Did she tell you where Ms. Baker was?

A. She said - I don't know that she said it, but it was clear that Ms. Baker had to be outside of the grand jury because I couldn't talk to her in the grand jury. So by implication, it was clear to me that she wasn't in the grand jury, but I don't remember the woman stating where she was.

Q. Did the secretary ever say to you that Ms. Baker had ever gone before the grand jury while you were being searched?

A. No.

Q. Do you know whether or not she was before the

* * *

[p. 61] what David Conn said about that, and I answered with respect to the anteroom outside of the grand jury.

Q. Now, my question is: In the room being searched by Mr. Oppenheim, do you know whether or not Tracy Baker was testifying before the grand jury at the same time?

A. Yes.

Q. And how do you know that?

A. Without waiving any privileges, I know that from the way I was led away and I heard her name called before the grand jury. I know that Conn's secretary told me that the client wanted to talk to me, and that was later during the search after she had been before the grand jury. I know what Conn said at the conclusion - after my second search and before we went to the duty judge. And I know what Conn told Judge Cooper in the courtroom with respect to the question or questions to which Ms. Baker did not answer.

Q. What did he say?

A. Well, that's a problem. That's a problem because, see what happened was, when we went before Judge Cooper -

Q. For the contempt hearing; correct?

A. Correct.

- we didn't - in any event, it was part of [p. 62] the grand jury proceeding. So it was closed and it's secret.

In the context of that hearing, we discussed what happened to Ms. Baker and what happened to me, who was her lawyer, who was to be representing her, who was in a separate room being searched.

And I had called counsel by this point, who were on their way down or, in fact, may have even appeared while I was before Judge Cooper.

And I then asked Judge Cooper, at the conclusion of the proceeding before her, which portions of this proceeding I could discuss with my counsel since I was ordered not to discuss those portions of the hearing that dealt with what Ms. Baker said, as opposed to what happened to me.

And Judge Cooper said I could tell my lawyers what happened to me, but I couldn't tell what happened to Ms. Cooper - excuse me, to Ms. Baker because that was part of the grand jury secrecy.

You have to realize this was over a year ago.

Q. All right. Let me stop you right there.

When you are taken out of the room to be searched -

A. Mm-hmm.

Q. - Ms. Baker is still in that waiting room

* * *

[p. 67] Words to the effect, "it's urgent," or, "she can't wait," or, "she's wanted before the grand jury."

My saying, "that's too bad. They will have to wait. They created this situation. They will wait as long as it takes for me to finish here with the search."

Q. All right. Now, during the search, what materials in your possession did Mr. Oppenheim look through?

MR. LIGHTFOOT: There's a later search. This is the search in the room with Oppenheim we're talking about?

MR. BRAZILE: Correct. The very first search.

THE WITNESS: He looked through everything in my briefcase and in the accordion file.

Q. BY MR. BRAZILE: Did he look at anything else or search through anything else besides your briefcase and the accordion file?

A. Well, there were items in the briefcase -

Q. Right. I understand that.

Other than the briefcase and the accordion file, did he search through anything else?

A. No.

Q. How long did it take him to search through your briefcase?

A. I estimated approximately 20 minutes.

Q. How long did it take him to search through the [p. 68] accordion file?

A. Oh, I misspoke. The total search is approximately 20 minutes. My estimate is it took longer to go through the briefcase than to go through the accordion file. I don't know how much longer. If you want to me to estimate -

Q. Yes, I do.

A. I'm saying the accordion file probably took a few moments with the exception of one file, which was either

in the accordion file or in the briefcase, which contained my notes of my conversations, my privilege attorney-client conversations, with Tracy Baker about the subject matter of the grand jury investigation in which she was a target in a perjury investigation which he read over my objection on several occasions and wanted photocopies.

Q. All right. Now, after these – your briefcase and the file had been searched, what happened next?

A. Well, during when that was going on, I also called lawyers –

Q. Okay.

A. – from the room. I told the lawyers that I was on the wrong floor, a floor other than I was on. And there was the one interruption by Mr. Conn's secretary.

Q. Did she interrupt during the search or after or before?

[p. 69] A. During.

Q. Okay.

A. What happened was, Mr. Oppenheim took the two pages of the purported three pages, the photocopy, of the letter allegedly written by Lyle Menendez to Tracy Baker with him. And I took my briefcase with its contents including the two files – two other attorney-client files, which he read over my objection that contained privileged information, and my accordion file and went out in the anteroom.

Q. Mr. Oppenheim went out in the anteroom?

A. I went with him. I don't know who left the room, if we both left that room and went out in the anteroom.

Q. The anteroom, that's where the bailiff is located?

A. Right.

Q. What happened after you get out to the anteroom?

A. At some point shortly thereafter, Conn comes up. He says, "Mr. Oppenheim" or "the special master" – I forget how he referred to him – "has determined that none of the items in your briefcase are privileged; therefore, Detective Zoeller is going to search your briefcase as directed by the judge who issued the search warrant" – "by [p. 70] the magistrate that issued the search warrant."

I protested. I asked that it be delayed so that my counsel could appear. I said that, "If he had made a determination that there was nothing privileged in my briefcase, he was incorrect or in error."

And Conn indicated, I believe, with a gesture or with words – I forget which – that the search was going to take place or I could either open the briefcase and show them – that Zoeller was going to go through it himself with Conn, Najera or Zoeller looking on.

I started to repeat the procedure that I had gone through with Oppenheim, and I pulled out the two other files besides Ms. Baker's, the one file that contained the notes of my interviews with her.

And I told Zoeller, "There's nothing in here pertaining to the subject matter of the search warrant."

And Zoeller said, "I believe you. I didn't look in those two" - Zoeller did not look in those two files, the other files, meaning Baker's accordion file and the file that contained her notes - I went through everything else. I opened it up.

And at some point Conn left and Najera and Zoeller stayed there and looked through and flipped through all of the documents in the Tracy Baker file and the other items in my briefcase except for the other two clients' [p. 71] files.

Q. When you came out of the anteroom or came out of the room with Oppenheim and entered into this anteroom or the waiting room where the bailiff was located, where was Tracy Baker at that time?

A. I don't know if she was there at that point or she came back in at some point. I believe she was present during the second search by Zoeller.

Q. But you are not sure of where she was when you first entered that room with Mr. Oppenheim after his search; correct?

A. I'm sure she was in one of two rooms.

Q. Which two?

A. She was either before the grand jury or she was in the anteroom.

Q. But you don't recall which one?

A. Right.

Q. How long does the second search take place or how long does the second search last?

A. Five minutes.

Q. Okay.

A. Approximately.

Q. And the second search takes place in the anteroom or the bailiff's room?

A. Correct.

[p. 72] Q. And Ms. Baker is present during the second search?

A. - She's present during part of it to the best of my recollection.

Q. The beginning, the end, the middle? What part of it?

A. She may have been present during all of it. If she wasn't there from the start, then it was some point after its initialization, but I believe she was there during some part of the second search.

Q. Do you know where she was during the part of the search that you couldn't see her or she wasn't in your eyesight?

A. I don't physically know. I believe she was in front of the grand jury. Those were the only two places where she was.

Q. Now, during the second search, what makes you believe that Ms. Baker was before the grand jury? What facts do you base that on?

A. That there was one of two places for her to be, and that's my best recollection.

Q. But you don't know which one it was. It was either one or the other; correct?

A. Correct.

Q. What happens after the second search is [p. 73] completed?

A. I believe after the second search is completed, I conferred with Ms. Baker on at least one occasion.

Q. About what?

A. About what she was being asked in the grand jury.

Q. All right.

A. And I did that in the anteroom. I did this in the anteroom with her.

Q. What time was it when the second search began, your best estimate?

A. Sometime after Oppenheim finished and before, I believe, 11:15 because the appearance before Judge Cooper was supposed to be at 11:30, I think. My best recollection.

Q. What time was the second search completed to the best of your knowledge?

A. Sometime before - sometime before 11:15.

Q. That's the best estimate you can give me, sometime -

A. Yeah.

Q. - before 11:15?

A. Yeah.

Q. Do you recall whether or not the second search

* * *

[p. 76] A. I don't recall. It may have happened.

Q. Was there ever occasion on March 21, 1994 where your client needed to speak with you and was not allowed to speak with you?

MR. LIGHTFOOT: I'm going to object to that. It calls for a conclusion on the part of this witness.

MR. BRAZILE: That he's aware of is what I want to know.

THE WITNESS: Well, I think that the time when she wanted - when they said my client wanted to consult with me and I was being searched was one such occasion.

Q. BY MR. BRAZILE: But during that, you don't know where she was, whether she was in the grand jury or some other place?

A. That's not really my testimony. I believe she was before the grand jury.

Q. Is there any other occasion you believe your client was before the grand jury and you didn't have access to her?

A. That's the only one I know of.

Q. Okay.

A. The correct answer to that question is no.

Q. You don't know of any other occasion?

A. Yes. I don't know of any other occasion.

Q. All right. And the one occasion that you are [p. 77] referring to is when the secretary came in and said your client needs to speak with you; correct?

A. Right.

Q. And you felt or your interpretation of that is your client was before the grand jury; correct?

A. Correct.

Q. Did you ever verify or confirm with Ms. Baker whether or not she was testifying before the grand jury -

MR. LIGHTFOOT: Objection.

MR. BRAZILE: Let me finish the question.

MR. LIGHTFOOT: Sorry.

Q. BY MR. BRAZILE: - when you were being searched?

MR. LIGHTFOOT: Objection. I assert the Fifth, Sixth Amendments and the attorney-client privilege on behalf of Ms. Baker.

MR. BRAZILE: Okay, Counsel, that question goes to the crux of this entire case, the one remaining claim. What I intend to do is, there are some other areas we can inquire into. I'm going to ask those questions. I'll come back and ask that line of questions last.

At that point, you will instruct him not to answer, and we are going to terminate the deposition. I'm going to request a meet and confer, and we can resolve it there. I'll file a motion. Okay?

[p. 78] Q. What time was your client's testimony before the grand jury completed, to the best of your knowledge?

MR. LIGHTFOOT: That again calls for speculation on the part -

MR. BRAZILE: I'm asking to the best of his knowledge.

THE WITNESS: Before 11:30.

MR. BRAZILE: All right.

Q. Now, what happens next after her grand jury testimony is completed?

A. Well, I think what you mean by your question, because it was the prosecution's interpretation that it wasn't completed. That's why we are going before the duty judge. I think what you meant is what happens next?

Q. Sure.

A. And what happened next was Conn told me we were going to go before the duty judge. It turned out to be Florence Marie Cooper, and I believe it was 11:30. And that was in the Department 110, and it's on whatever floor it is.

And I conferred with Ms. Baker. I called my office again to find out where the lawyers were that I had called. I went up, or down, whichever way it was. I think it was up to Department 110. Stood outside of the courtroom.

* * *

[p. 82] have personal knowledge, no.

Q. BY MR. BRAZILE: So you are just aware of one occasion where she wanted to talk to you and couldn't talk to you because you were being searched; is that correct?

(Whereupon, a discussion was held between the deponent and his counsel out of the hearing of the reporter.)

MR. LIGHTFOOT: Why don't you ask the question again.

MR. BRAZILE: Would you read the question back.

(The requested portion of the record was read by the reporter.)

THE WITNESS: Yes.

Q. BY MR. BRAZILE: Yes, that's correct?

A. Yes.

Q. All right. Are you aware of any occasion where she wanted to talk to you before she went into the grand jury room to testify and she was not allowed to because you were being searched or were made unavailable?

A. Well, I believe she wanted to talk to me when I was being led away to be searched.

Q. Why do you believe that? What did she say, if anything?

A. I don't recall the contents of what she said, but I could tell you by the way she looked that she looked [p. 83] extremely upset and flustered, that she did not want to be left alone with the people that were investigating her for perjury.

Q. Did she ever say to you, as you were being lead, "I have to talk to you. I need to discuss something with you?"

A. She may have. I don't recall.

Q. Do you recall any other occasion before she went in before the grand jury where she made a request to speak with you and she was not allowed to because you were unavailable for some reason?

A. No.

Q. Were there any occasions on March 21st, 1993 (sic) where you were prevented from giving legal advice to your client, Tracy Baker?

MR. LIGHTFOOT: Again calls for speculation on the part of the witness.

MR. BRAZILE: That he's aware of. All my questions are based upon his personal knowledge.

THE WITNESS: Other than I believe you meant 1994.

Q. BY MR. BRAZILE: I said - I'm sorry, 1994.

A. To be responsive to the question, other than the time I was being searched and the secretary said my client wanted to talk to me, no.

Q. Are you claiming any medical expenses as [p. 84] damages in this particular lawsuit?

A. No.

Q. Are you claiming any loss of earnings as part of your damages in this particular lawsuit?

A. No.

Q. Are you claiming any loss of earning capacity as a result of this action?

(Whereupon, a discussion was held between the deponent and his counsel out of the hearing of the reporter.)

THE WITNESS: No.

MR. BRAZILE: All right.

Q. Are you claiming any special damages at all as a result of this action?

MR. LIGHTFOOT: I'm going to object to the question as being ambiguous.

MR. BRAZILE: Are you instructing him not to answer?

MR. LIGHTFOOT: I'm asking you to explain what you mean by "special damages."

MR. BRAZILE: Okay. I'll rephrase the question.

Q. What are the damages that you are now claiming - as a result of your lawsuit that we're here on today?

MR. LIGHTFOOT: And I'm going to instruct him not to answer that because that calls for a legal

conclusion. Those matters are stated clearly in the complaint.

* * *

[p. 99] Q. Do you remember seeing his secretary after you left the first search?

A. I remember seeing her at some point during that morning in the anteroom, but I don't specifically remember seeing her in the anteroom after the first search.

Q. So you didn't mention during - while you were in the anteroom, you didn't mention to David Conn that your client had wanted to speak to you earlier; is that correct?

A. That's correct.

Q. Is there a reason you didn't mention it to him at that point?

A. Yes. There are several reasons.

First of all, whenever I asked Mr. Conn for anything, the answer was, "No. We don't have to do it your way. We won't wait for your counsel. The search is going to take place now. We don't have to do anything the way you want to." And it was a series of edicts from Mr. Conn.

Also formerly when I had discussed things with Mr. Conn, he had misrepresented to me that he was typing up a use immunity letter or having his secretary do so when the truth is, in fact, they were typing up a search warrant.

So it wasn't exactly on my mind to talk to Mr. Conn about that particular manifestation of his [p. 100] impatience in my misrepresentation of Ms. Baker, who he was now in the process of taking in front of a duty judge to be held in contempt.

Q. You did not feel it was important to speak to him or even mention the fact that you had not been allowed to speak to your client?

A. I thought lots of things were important, but this was not my first duty of business in that the point it -

Q. You didn't give any kind of insight into the fact that his secretary had mentioned anything to you while you were in the first search?

A. Not to my recollection, sir.

Q. Approximately how far away was David Conn's secretary when she made that statement?

A. I think she was at the door to a secretarial space or an office space. I guess she was about ten feet away.

Q. Did Mr. Oppenheim say anything to David Conn's secretary after she made her statement?

A. Not to my - not to my recollection.

Q. Did he make any kind of expression to the best of your knowledge?

A. Other than Mr. Oppenheim's gratuitous comments about various dress sizes on my personal calendar, he

* * *

[p. 107] I recall Conn being near there. Najera and Zoeller being there. Conn saying that Oppenheim had made the determination that there was nothing privileged in my briefcase. So Zoeller was going to search.

Conn was there at the inception of the search. Conn, Najera finished the search. Where Oppenheim was might have been to the - behind or to the side.

Q. During the second search, did you make a statement to anyone who was present at that time regarding whether or not your client had just been in the grand jury proceedings?

A. I don't think so.

Q. Did your client make any kind of representation that she had just been -

A. I don't think my client was saying much then, sir. I don't believe so.

Q. Therefore, you also didn't - did you make a representation that your client had attempted to speak to you or wanted to speak to you during the time of the first search while you were at the second search to any persons present?

A. I don't recall. Going through the second search, that was what my attention was focused on.

Q. And immediately following that search, did you have a discussion with your client?

[p. 108] A. As I have testified I had a conversation with my client after the second search. Whether it was immediately afterwards or not, I don't know. I don't recall.

Q. Do you recall whether it was in the anteroom?

A. I believe it was in the anteroom.

Q. Do you recall other persons were present?

A. I might have started to confer with her when there were people present, but I believe the bailiff left.

Q. You testified earlier during the first search that you called some lawyers; is that correct?

A. Yes.

Q. Do you recall who you attempted to contact?

A. Yes.

Q. Who would that be?

A. I called Michael Nasatir and Richard Hirsch and Vicky Podberesky.

Q. Did you speak to any of those attorneys?

A. I spoke to all three of them.

Q. Do they all work in one office?

A. Yes.

MR. LIGHTFOOT: P-o-d-b-e-r-e-s-k-y. Hirsch is H-i-r-s-c-h.

Q. BY MR. KRIEGER: At what point during the first search did you contact those attorneys?

* * *

EXHIBIT 4

03-21-94

D.D.A. DAVID CONN

(MENENDEZ CASE)

WITNESS LIST

1. LESLIE HOWARD / 1026 HRS. - 1054 HRS.
ZOELLER

2. TRACI LEE / 1054 HRS. - 1056 HRS.
BAKER

BREAK - 1056 HRS. - 1107 HRS.

BAKER TESTIMONY CONTINUED
1107 HRS. - 1112 HRS.

TO DEPT #110 FOR CONTEMPT PROCEEDINGS.

T.W. Fox
#112924

EXHIBIT 5

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,)	
Plaintiff)	
-vs-	)	No. 94-4227
DAVID CONN, CAROL NAJERA,	)	(RSWL) (Ex)
ELLIOT OPPENHEIM, LESLIE)	
ZOELLER, and DOES 1 THROUGH)	
X, Inclusive,)	
Defendants.)	

DEPOSITION OF TRACI L. BAKER, taken on behalf of Defendants, at 500 North Temple Street, Suite 648, Los Angeles, California, at 2:30 p.m., Thursday, May 4, 1995, before JENNIE A. ARNOLD, CSR No. 4182, pursuant to Notice.

Reported by: JENNIE A. ARNOLD, CSR No. 4182
Job No. 95-0504JAA

[p. 3] APPEARANCES

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* * *

[p. 43] question?

(The record was read.)

MS. PODBERESKY: Mr. Brazile, on March 21st,
up to what time are you asking for?

MR. BRAZILE: Prior to her giving testimony before the grand jury. That was the last part of the question.

THE WITNESS: Between March 18th and the 21st, prior to my going into the grand jury?

BY MR. BRAZILE:

Q Correct. That's the question.

A Two.

Q Going back to March 21, 1994, I believe you told me earlier you met up with Mr. Gabbert on the 13th floor.

A That's right.

Q Do you recall going to the grand jury room with Mr. Gabbert on that particular day?

MS. PODBERESKY: Any time during that day? Is that your question?

BY MR. BRAZILE:

Q After you met up with Mr. Gabbert on the 13th floor, where did the two of you go?

A I believe the cafeteria area.

Q How long did you spend in the cafeteria area?

A Approximately, less than 30 minutes - between 5 and 30.

[p. 44] Q Did the two of you have any conversations while you were in the cafeteria?

A Yes.

Q Did he give you any legal advice of any kind while you were in the cafeteria?

A Yes.

Q How many times did he give you legal advice while you were in the cafeteria?

MS. PODBERESKY: I am going to object. It's vague. I think the witness has said they were meeting in the cafeteria. So there was that meeting. I'm not sure what your question was.

MR. BRAZILE: She also said she was given legal advice during the meeting in the cafeteria; is that correct, Miss Baker?

THE WITNESS: If I may, for one moment.

(The witness confers with her counsel out of the hearing of the reporter).

MS. PODBERESKY: Could you repeat your last question, please?

MR. BRAZILE: Miss Reporter, could you please read back the last question, please.

(The record was read.)

THE WITNESS: I can't pinpoint the amount of the times.

[p. 45] BY MR. BRAZILE:

Q Give me your best estimate.

A I don't know the amount of times.

Q More than once?

MS. PODBERESKY: I am going to object. The witness has answered the question. She can't answer that. It's a vague question, Mr. Brazile.

MR. BRAZILE: No, it's not.

MS. PODBERESKY: Yes, it is.

MR. BRAZILE: Counsel, are you instructing her not to answer? Yes or no?

MS. PODBERESKY: I'm not instructing her not to answer. I am asking you to please clarify your question. It's a vague question.

MR. BRAZILE: The question is, did he give her legal advice on more than one occasion when they were in the cafeteria.

MS. PODBERESKY: I think the problem, Mr. Brazile, is that my client considers the meeting in the cafeteria an occasion. So whatever advice was given during that occasion, there was advice given. And beyond that, I don't know that the question is clear. It's vague.

MR. BRAZILE: So the record is clear, what I'm trying to find out is did he give her one piece of legal advice? Two pieces of legal advice? Three or four? Whatever? [p. 46] You're not going to let me ask her what he told her?

MS. PODBERESKY: That's right.

MR. BRAZILE: So what I'm trying to find out from this witness is how many pieces of legal advice did she get.

MS. PODBERESKY: And my answer to you is "pieces of legal advice" is ambiguous, and my client can't answer that.

MR. BRAZILE: Are you instructing her not to answer?

MS. PODBERESKY: No, I am not. I'm just saying your question is vague and ambiguous. It's not possible to answer that kind of question.

BY MR. BRAZILE: Okay.

Q You can answer.

A I suppose one piece of advice. That's my only way to answer you.

Q What happened after the two of you left the cafeteria? Where did you go?

A We went back up to the 13th floor.

Q What happened when you got to the 13th floor?

A I believe Mr. Gabbert went to check me in.

Q Where were you when he went to check you in? Were you with him, or were you in another room?

A I was waiting in the hall area. There is some seating in the hall, marble benches, that I was sitting at.

Q What happened after he went to check you in?

A He came back out to sit with me and wait.

[p. 47] Q How long did you sit and wait?

A Exactly, I couldn't tell you, but not more than 45 minutes.

Q And during that 45-minute period of time, did Mr. Gabbert give you any legal advice of any kind?

A Unfortunately, the problem is I don't understand exactly understand what you mean by "legal advice."

Q Did he tell you anything about your testimony before the grand jury?

(The witness confers with her counsel out of the hearing of the reporter.)

THE WITNESS: I would say, yes.

BY MR. BRAZILE:

Q Did the two of you discuss during that 45-minute period of time what your testimony before the grand jury would be?

MS. PODBERESKY: I'm going to object on the basis of the Sixth Amendment and the attorney-client privilege and instruct my client not to answer.

BY MR. BRAZILE:

Q How long during that 45-minute period of time did the two of you discuss your grand jury testimony?

MS. PODBERESKY: I am going to object, in that the question assumes facts not in evidence. She indicated it was

* * *

[p. 55] A Yes.

Q Who?

A The jury forewoman - the woman that sits at the podium to your left. Is that the jury foreperson

Q Foreperson.

A Yes. The African-American woman - my recollection is she was near the door - Mr. Conn, Miss Najera, the court reporter and the grand jury members, various people.

Q Do you recall being asked any questions by Miss Najera while you were in the grand jury room before the actual grand jury?

A I don't recall.

Q Do you recall being asked by anyone while you were in the grand jury before the grand jury if you knew Lyle Menendez?

A Yes.

Q Who asked you that question?

A I don't recall exactly which one of them asked me.

Q Did Carol Najera ask you, when you were in the grand jury room, whether or not you knew Lyle Menendez?

A Again, my recollection is that it was Miss Najera.

Q And while you were in the grand jury room, did

* * *

[p. 58] attorney, Paul Gabbert?

A I was allowed to leave the room. When I got out of the room, Paul was not there. I sat for a moment, feeling very agitated, got up, and went out into - there is

an area where you first come in some glass, double doors where there is a place for a secretary-type person or a receptionist to sit – and I encountered a heavyset woman and I asked her did she know where Paul was. I don't remember if she actually said she knew where he was, but she indicated in some manner she would try to assist me in finding him.

Q Was she an attorney?

A I don't know.

Q Did she find Mr. Gabbert?

A She located him. And my recollection is that he was across toward the back of the large room in which the heavyset woman was seated in the front of this room. I saw Mr. Gabbert across the room, and I recall him – he was taking his jacket off is the memory I have fixed in my mind – and somehow, either verbally or using body language, or some way, I got the indication from him that I should go ahead and go back in and assert my Fifth Amendment right.

Q How did you get that indication from Mr. Gabbert?

A At this time I don't remember. I just remembered that that is – somehow that is what was conveyed to me from him.

[p. 59] Q Did the two of you make eye contact?

A I don't recall.

Q Did he say anything to you?

A Again, I don't recall specifically. I just know that's the action I took.

Q You say he had his jacket off; correct?

A Yes.

Q Was anyone with him?

A As far as speculating –

Q Did you see anyone in his presence?

A No, I didn't. Because I was only given partial view, from the vantage point I was standing into the room.

Q Now, this older gentleman that you said – this Special Master that was with Mr. Gabbert, did you see that when you had this picture of Mr. Gabbert with his coat off?

A I don't recall seeing him in the room. I do remember seeing him in the waiting area. I do remember him because he was dressed all in blue.

Q So when you asked the grand jury could you go and confer with your attorney, did you confer with your attorney?

A At that point, no.

(The witness confers with her counsel out of the hearing of the reporter.)

THE WITNESS: No.

[p. 60] BY MR. BRAZILE:

Q You did not; correct?

A That's correct.

Q Even though you made a request to do so; correct?

A Yes.

Q And the reason you did not consult with your attorney is what?

A He was in another room subject to a search.

Q Could you see anyone searching him?

A Not that I recall.

Q Did you ask anyone to convey a message to him?

A Yes. I initially asked the heavysset lady - she was dressed in pink, if you can go that far back - I don't remember who it was - if she could get my attorney, I needed to ask him something regarding whether or not I could answer a question. I wasn't specific with her, but I asked for her assistance.

Q Again, what did she tell you?

A Again, I don't remember. I had the recollection that she was in some way trying to be helpful to see that perhaps she would go to see if she could find him, or she called in that direction or something.

Q Now, this room that you saw Mr. Gabbert in, where were you when you were looking at him in this room?

A Are you familiar with where I am referring to?

[p. 61] Q I believe so, yes.

A Okay. I think there are double glass doors that you walk into, and you go to your right to get into the actual waiting area. There is a front desk reception area, and there's a hallway here (indicating). I was standing far enough back so I could see her typewriter and other office items back there. I was standing right about here (indicating,) and my recollection is that he was standing in a room somewhere in this neighborhood (indicating).

Q Did you see anyone else in the room that he was in at that time, that being Mr. Gabbert? Was anyone else in the room with him at that time?

A I heard him speaking, but I didn't see anybody in the room with him.

Q What was he saying?

A I don't know.

Q After you see Mr. Gabbert, and you don't communicate with him, what did you do next?

A Somehow communication took place, at least on my end. I felt that I should go back in and assert my Fifth Amendment right, although I can't specifically tell you whether it was through body language or verbal or what. But I went back into the room and asserted my Fifth.

Q Prior to you going back in the room to assert the Fifth Amendment right, did Mr. Gabbert say anything to you?

. . .

[p. 67] was saying the sentence, "May I have a moment with my attorney," Mr. Conn got up and was very upset. I don't know what caused him to be upset, but he started

discussing something with the jury foreperson that he was moving to hold this witness in contempt because I didn't produce something.

Q So at is that point, was that the third or fourth time that you had asserted the Fifth Amendment privilege?

A I had only asserted the Fifth Amendment twice. The third occasion that they began to ask me a question, of which I don't remember the exact content, I was about to ask for a moment with my attorney - which would have been the third time - that I asked for a moment with my attorney, and Mr. Conn got up and was angry about something and said that he was going to hold me in contempt of court which then, of course, added to my already hysterical nature at that time because I was whacked out. So -

Q Then what happened?

A I think I was let out of the room. Well, she admonished me, and I was let out of the room, and I was in the waiting area. By then, I believe Mr. Gabbert was back with me. Someone, I think Mr. Zoeller, delivered - no, I take that back - I'm not clear on this at all. At this time - I don't know if it's correct in time sequence, this is my memory - Mr. Gabbert was searched, his physical stuff, by Mr. Zoeller. And I believe Mr. Conn and Miss Najera were [p. 68] there for a period of time, although it's not my feeling they were there the entire time. They looked through Mr. Gabbert's personal -

Q When you say "they," who are you referring to?

A I will rephrase that. Well, "they" would be Mr. Zoeller, and I think Miss Najera and Mr. Conn were in the room. Mr. Zoeller was physically looking through Mr. Gabbert's briefcase and his man's purse. It's a purse. It wasn't a woman's purse.

Q When you went in to testify before the grand jury on the first occasion, did Mr. Gabbert ever indicate to you where he would be when you were testifying?

A Not that I recall.

Q Did he ever tell you, prior to you going in to testify before the grand jury, that he would go in the grand jury room with you?

MS. PODBERESKY: I am going to object. It calls for attorney-client privileged information, and instruct my client not to answer.

BY MR. BRAZILE:

Q Did you have any understanding whatsoever as to where Mr. Gabbert would be when you were in the grand jury testifying?

A Yes.

Q Where did you believe he would be?

[p. 69] A In the waiting area.

Q Did he tell you he was going to be in the waiting area, or did someone else tell you he would be in the waiting area.

MS. PODBERESKY: I am going to object to the extent it calls for attorney-client privilege and instruct my client not to answer.

BY MR. BRAZILE:

Q Why did you believe that he would be waiting for you in the waiting area while you were testifying before the grand jury?

(The witness confers with her counsel, Plaintiff and Plaintiff's counsel out of the hearing of the Reporter.)

MS. PODBERESKY: Can you repeat the question?

BY MR. BRAZILE:

Q Why did you believe that Mr. Gabbert would be waiting for you in the waiting room when you were testifying before the grand jury?

A Because I knew that he was not allowed to be in there with me. I believed he would be somewhere close by.

Q Let's go back to when you testified before the grand jury on the first occasion.

Did you tell anyone in the grand jury room when you first went in to testify that you were not able to speak

* * *

[p. 75] BY MR. BRAZILE:

Q You can answer.

A That was the period of time that seemed to me a lengthy time waiting for Paul to appear so I could confer with him. When he did not reappear, I was instructed by a member of the Court – I don't know if it was the bailiff or the African-American woman – that I had to go back

in, that I could not wait any longer, that I was ordered to go back in.

Q When you were ordered to go back in, you were asked another question?

A Same question.

Q What response do you give?

A I asserted the Fifth Amendment.

Q Did you say you were stating the Fifth Amendment, based upon the advice of counsel?

A I repeated what was on my card – similar statements. It was a long time ago so I don't know if the words you are using would be the exact quote.

Q So you don't know if you used the words, "Based upon the advice of counsel"; is that your testimony?

A That's correct.

Q So after this, I believe this is about the third time you have gone in before the grand jury now?

A Yes, this was my third appearance through the [p. 76] door.

Q Then what happens?

A They asked me the question. I said, "May I have a moment with my attorney." Mr. Conn got up, and I don't know what he said, but I recall him saying that he was moving to hold me in contempt. At that point, the Jury forewoman said whatever she needed to say, admonished me, and I was taken out into the waiting area again.

Q Then what happened?

A I think this is where Mr. Zoeller was searching Paul's personal items – briefcase and purse. After that, I was ordered down the hallway by the bailiff. Paul was not with me. He was gathering – he was not with me. I don't know what he was doing. The bailiff, court reporter, African-American gentleman, court reporter, some other folks were coming. We were being taken to another courtroom where a contempt of court hearing was to be taking place.

Q Then what happened?

A We were taken into the courtroom. Paul eventually caught up with us. Mr. Gabbert eventually caught up with us, and he wasn't allowed to go in the courtroom at first. I was sitting there alone with Mr. Conn. We were just waiting around for awhile. Eventually Mr. Gabbert was allowed to come in the room, and I think that's when what's called a hearing or proceeding took place.

* * *

[p. 87] A I don't recall.

Q Who else was present?

A I know Mr. Zoeller was there. And other than that, I don't have a specific reference.

Q And you described Mr. Zoeller was in the process, I think you described it, as searching?

A I don't know if he was in the process when I came out, but at some point thereafter shortly he was looking through Mr. Gabbert's personal items.

Q What was Mr. Gabbert doing at the time Detective Zoeller was doing this?

A He was standing, opening his briefcase and then eventually going item by item through his purse saying what they were.

Q Describing the contents to Detective Zoeller?

A (Witness confers with her counsel.)

He was actually removing them item by item, putting them on the table and stating, "This is not a letter, this is not a letter."

Q Who is saying that?

A Mr. Gabbert.

Q Mr. Gabbert is removing contents of his belongings, laying them on the table, and as he does, with each item he is saying "This is not a letter"?

A Maybe not with each item. But he said it more [p. 88] than one time.

Q Did he appear to be agitated as he was saying this?

A Yes.

Q Was his voice raised?

A Yes.

Q What else do you recall Mr. Gabbert saying during this time?

A I specifically don't recall any other phrases that I can remember right now.

Q What do you recall, if anything, being said by Detective Zoeller during this time?

A No recollection.

Q How long did this search that you have described take place?

A Why do you ask me these things?

Five or ten minutes.

Q During that time, the only two items that you saw being looked through were the purse and the briefcase; is that correct?

A That's correct.

Q What happened at the end of this? What I'm looking for is, did Detective Zoeller pick something up and say "This is what I want," and walk away, or did he stand around and Mr. Gabbert put his belongings back together? [p. 89] What happened at the conclusion of the search?

A I don't believe Mr. Zoeller found anything he was looking for. Mr. Gabbert's belongings were then - I think he gathered them back into where they should have been. And my next recollection is that we were then going to the room.

Q So other than yourself, Mr. Gabbert and Detective Zoeller, was there anyone else present when this search was occurring?

A Initially, Mr. Conn and, I believe, Miss Najera were there. But I don't believe they were there the entire

time. Now, that is just what I recall. I don't know if that's, in fact, the case.

Q Did either Mr. Conn or Miss Najera say anything to either Mr. Gabbert or Detective Zoeller at the time the search was occurring?

A I recall, not conversation, words coming out of one or two or both of their mouths. I don't know who it was directed to, but I remember them speaking at some point.

Q You don't recall what was said?

A No.

Q At the time you went down the hall for what you described as a contempt hearing, you testified that Mr. Gabbert ultimately made it into the room where you were with Mr. Conn?

A Yes.

* * *

[p. 95] room and expect me to know what's happening.
BY MR. MacLATCHIE:

Q When you say you had no prior knowledge of the questions being asked, I would assume you had no knowledge of the specific questions they would be asking you, word-for-word; is that correct?

A That, and really not a whole lot of indication of what else either.

Q Did it come as a complete surprise to you, out of the blue, that you were asked about your knowledge of Lyle Menendez?

(Witness confers with her counsel out of the hearing of the reporter.)

MS. PODBERESKY: You can answer the question.

THE WITNESS: No. It was not a complete surprise.

MR. MacLATCHIE: I have nothing further.

MR. BRAZILE: Well, I have nothing further either.

Can we stipulate that the court reporter will be relieved of her duties under the Code; that the original of the deposition transcript will be sent to Miss Baker's attorney; that within 30 days of receipt all counsel are to be notified of any changes to the deposition transcript. If we are not so notified within 30 days of receipt, there are to be no changes to the deposition transcript; that the witness will sign the transcript under penalty of perjury;

* * *

[p. 98] STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

I, JENNIE A. ARNOLD, CSR No. 4182, a Court Reporter in and for the County of Los Angeles, State of California, do hereby certify:

That prior to being examined, TRACI L. BAKER, the witness named in the foregoing deposition, was by me

duly affirmed to tell the truth, the whole truth, and nothing but the truth;

That the said deposition was taken before me pursuant to Notice at the time and place therein set forth and was taken down by me; in shorthand and thereafter transcribed into typewriting under my direction and supervision; that the said deposition is a true and correct record of the testimony given by the witness:

That it was stipulated by counsel that said deposition may be read, corrected and signed by the witness under penalty of perjury.

I FURTHER CERTIFY that I am neither counsel for nor in any way related to any party to said action nor in any way interested in the outcome thereof.

IN WITNESS WHEREOF, I have subscribed my name this 10th day of May 1995.

/s/ Jennie A. Arnold
Jennie A. Arnold

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 Paul L. Gabbert

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NO.
Plaintiff	)	CV 94-4227-RSWL(Ex)
vs.	)	PLAINTIFF GABBERT'S
	)	CONSOLIDATED
DAVID CONN,	)	OPPOSITION TO
CAROL NAJERA,	)	DEFENDANTS' MOTIONS
ELLIOT	)	FOR SUMMARY JUDGMENT
OPPENHEIM, AND)	
LESLIE ZOELLER,	)	Date: October 2, 1995
	)	Time: 9:00 a.m.
Defendants.	)	Place: Courtroom 21

Plaintiff Paul L. Gabbert hereby submits the following memorandum in Opposition to the defendants' Motions for Summary Judgment.

DATED: September 18, 1995

Respectfully submitted,

MICHAEL J. LIGHTFOOT
 MELISSA N. WIDDIFIELD
 TALCOTT, LIGHTFOOT,
 VANDEVELDE WOHRLE
 & SADOWSKY

/s/ Melissa N. Widdifield
 By: MELISSA N. WIDDIFIELD
 Attorneys for Plaintiff
 Paul L. Gabbert

I

INTRODUCTION

Defendants Conn and Najera on the one hand, and Zoeller and Oppenheim on the other, have filed motions for summary judgment. Because of the similarity of issues raised by the defendants, plaintiff Gabbert is hereby filing a consolidated opposition to the two motions.

Each of the defendants contends that he or she is entitled to absolute immunity in this case.¹ Defendants Conn and Najera claim prosecutorial immunity, while Zoeller and Oppenheim claim quasi-judicial immunity. Alternatively, the defendants assert that if they are not entitled to absolute immunity for their conduct in this case, they are nonetheless entitled to the protections of qualified immunity. Lastly, the defendants argue that plaintiff's claim for injunctive relief is barred.²

As revealed more fully below, all of the defendants' arguments are without merit. Indeed, as the evidence in this case amply demonstrates, the defendants violated

¹ Conn and Najera apparently claim absolute immunity with respect to the first, but not the second, search of plaintiff Gabbert.

² Defendant Oppenheim additionally contends in his motion that the Court's September 30, 1994 order dismissing certain of plaintiff Gabbert's claims should also apply to him despite the fact that defendant Oppenheim answered the Complaint and did not file a motion to dismiss. Plaintiff would agree to stipulate that defendant Oppenheim can be deemed to have filed the same motion to dismiss as defendants Conn and Najera and that plaintiff Gabbert filed the same response thereto.

plaintiff Gabbert's clearly established fourteenth amendment right to practice his profession free from governmental intrusion. Moreover, none of the defendants is entitled to either absolute or qualified immunity. Finally, based on the particular set of facts presented by this case, plaintiff is entitled to injunctive relief.

II

STATEMENT OF FACTS

On Monday morning, March 21, 1994 Traci Baker, accompanied by and represented by her attorney, plaintiff Paul L. Gabbert, checked in with the grand jury bailiff prior to her scheduled appearance before the grand jury. See Exhibit 1, Excerpt of Deposition Transcript of Paul L. Gabbert at pp. 4-5; Exhibit 2, Excerpt of Deposition Transcript of Traci L. Baker at pp. 34-35.³ Ms. Baker was unfamiliar with a grand jury and was frightened at the prospect of appearing before one. See Ex. 2, Baker Depo. at pp. 56-60. Of some solace to Ms. Baker was her belief that her lawyer would be available to her before and during her appearance should she need his advice. See Ex. 2, Baker Depo. at pp. 52-53.

While waiting in the hallway outside the grand jury room, plaintiff Gabbert and Ms. Baker were approached by defendants Conn and Najera. Defendants engaged plaintiff in a discussion regarding a possible grant of

³ A separately bound set of exhibits in support of plaintiff's opposition has been concurrently filed with this memorandum. Citation to exhibit page numbers shall refer to the imprinted "Bates" number, not to the document's original pagination.

immunity for Ms. Baker. The four of them went to defendant Conn's office to discuss the matter further. See Ex. 1, Gabbert Depo. at pp. 7-8; see also Exhibit 3, Excerpt of Deposition Transcript of David Conn at pp. 67, 70. Based on the conversation with defendants Conn and Najera, plaintiff Gabbert believed that Conn would prepare a draft letter of immunity for Ms. Baker that morning. Plaintiff and Ms. Baker returned to the grand jury area to wait for defendants Conn and Najera to return with the letter. See, Ex. 1, Gabbert Depo. at pp. 10-12. Instead of preparing an immunity letter as Conn led plaintiff Gabbert to believe, defendants Conn and Najera caused a search warrant for plaintiff Gabbert to issue. See Ex. 3, Conn Depo. at pp. 63, 80, 82; see also Exhibit 4, Excerpt of Deposition Transcript of Carol Najera at pp. 112-113.

Defendant Conn decided to obtain the warrant for plaintiff by the time plaintiff and Ms. Baker were in Conn's office discussing the immunity issue. See Ex. 3, Conn Depo. at p.86. Once having made the decision to seek the warrant, defendant Conn directed his assistant, Patti Jo Fairbanks, and defendant Zoeller to prepare the warrant application. Conn provided them with the necessary information to do so. See Ex. 3, Conn Depo. at pp. 80, 83-85. Although actually executed by defendants Zoeller and Oppenheim, the search warrant for the person of the plaintiff was caused to be issued and executed by defendants Conn and Najera. See Ex. 3, Conn Depo. at pp. 87-88. Defendant Conn specifically understood that the warrant would be executed just before Ms. Baker's scheduled testimony. *Id.*

Defendants Conn and Najera watched as defendant Zoeller served plaintiff with the warrant and defendant

Oppenheim took plaintiff Gabbert into a separate room to conduct the search. *See* Ex. 3, Conn Depo. at pp. 89-90; Ex. 4, Najera Depo. at p.120. Defendants Conn and Najera then entered the grand jury room and had Ms. Baker called as a witness. *See* Ex. 3, Conn Depo. at pp. 90, 92-93.

Ms. Baker was extremely apprehensive and nervous prior to her grand jury appearance. Her distress was due in part to the inherently intimidating nature of the grand jury itself, but also due to the fact that in the hallway moments earlier, defendant Conn has asked plaintiff Gabbert, in Ms. Baker's presence, whether plaintiff would surrender Ms. Baker in Los Angeles or whether she would have to be arrested in Orange County. *See* Ex. 2, Baker Depo. at pp. 38, 57. Plaintiff Gabbert knew that Ms. Baker wanted to speak with him before she went into the grand jury room, but he was unable to do so because he was detained by defendant Oppenheim. *See* Ex. 1, Gabbert Depo. at p.25. As Ms. Baker described her state of mind at that point,

Suddenly there's a search warrant. My attorney is taken away from me. And I was shaking, really upset, I don't know what to do. I just know I'm, going to go into a room with a bunch of people I don't know that are going to ask me questions, and I don't know what I should say. So I come out looking for the only rock that I have for help, and he wasn't there. So I was stuck with some bailiff guy and nobody sitting there. I'm not saying that to be dramatic. That is exactly how I felt.

See Ex. 2 Baker Depo. at p.57.

In response to the first question put to her before the grand jury, Ms. Baker stated that she had not been able to confer with her attorney because he was with the special master. *See* Exhibit 9, Transcript of Grand Jury Testimony of Traci L. Baker at p.199.⁴ She then asked for an

⁴ As noted, plaintiff has attached a copy of Traci Baker's March 21, 1994 grand jury testimony as an exhibit to this Opposition. The transcript was obtained by plaintiff in the course of discovery via a Superior Court order. Plaintiff had asked defendants Conn and Najera early on in this litigation to voluntarily produce the requested transcript. Defendants refused to do so on the grounds of grand jury secrecy, despite the fact that they themselves had already obtained the transcript. Plaintiff was forced to seek a court order to obtain what the defendants already had. On May 19, 1995, the Hon. J. Stephen Czuleger ordered defendants to produce the transcript of Ms. Baker's testimony and strongly admonished County Counsel for their conduct, which the Court described as "sandbagging." *See* Exhibit 10, Transcript of Superior Court hearing at pp. 246-247, 252. Now, in contravention of the Superior Court's order, and in violation of grand jury secrecy rules, defendants Conn and Najera have attached a copy of defendant Zoeller's grand jury testimony, as well as the opening statement by the prosecutor, as an exhibit to their motion for summary judgment. *See* Exhibit 2 to defendant Conn and Najera's Motion for Summary Judgment. Not only was plaintiff not previously provided with this portion of the transcript (in fact, it was clearly redacted from the transcript provided to plaintiff), but its disclosure constitutes a flagrant and cavalier disregard for the grand jury secrecy provisions of California's Penal Code (*see* §§ 924 *et seq.*), as well as the specific terms of the Superior Court's order, dated May 19, 1994. Moreover, since the additional portion of the transcript is irrelevant to the issues raised by the defendants in their motion, the only possible purpose for and motive for the defendants conduct is to attempt to impugn Ms. Baker's character. A Federal Court should not countenance such conduct.

opportunity to consult with plaintiff Gabbert. *Id.* Ms. Baker was unable to do so, however, because plaintiff Gabbert was being searched. *See* Ex. 2, Baker Depo. at p.44. Plaintiff Gabbert requested that the grand jury proceedings be delayed until the search was completed so that he could fulfill his obligation to his client and be available to counsel her. *See* Ex. 1, Gabbert Depo. at pp. 16, 17-20, 27. This request was denied and Ms. Baker was commanded to return to the grand jury room. *See* Ex. 1, Gabbert Depo. at pp. 17, 19-20; Ex. 2, Baker Depo. at p.47.

Ms. Baker returned to the grand jury room distressed and upset. *See* Ex. 2, Baker Depo. at pp. 49-50. In response to the next question, Ms. Baker again asked to confer with her attorney. *See* Ex. 9, Baker Grand Jury Transcript at p.200. Again, plaintiff Gabbert was not available to confer with his client because he was still being searched. *See* Ex. 2, Baker Depo. at pp. 49-50. Ms. Baker was ordered back into the grand jury room. *Id.* at p.50. She was now in an even greater state of agitation because she did not know whether she had responded to the previous question appropriately and was also unsure as to how to respond to the pending question. *Id.* In response to the third question, Ms. Baker once again sought to confer with plaintiff. *See* Ex. 9, Baker Grand Jury Transcript at p.201. Upon exiting the grand jury room on this occasion, Ms. Baker was met by the search of plaintiff Gabbert by defendant Zoeller. *See* Ex. 2, Baker Depo. at pp. 51-52. Defendants Conn and Najera requested that defendant Zoeller perform this search and also participated in at least a portion of this search. *See* Ex. 1, Gabbert Depo. at p.22; Ex. 2, Baker Depo. at pp. 51-52; Ex. 4, Najera Depo.

at p.131; *see also* Exhibit 5, Excerpt of Deposition Transcript of Leslie Zoeller at pp. 150, 153-154. Shortly thereafter, Ms. Baker, still separated from plaintiff Gabbert, was taken to Department 110 of the Superior Court in connection with contempt proceedings initiated by defendants Conn and Najera. *See* Ex. 2, Baker Depo. at p.55.

On the basis of the above factual allegations, this Court previously ruled, in the context of defendant Conn and Najera's motion to dismiss, that plaintiff had stated a claim for a violation of his fourteenth amendment right to practice his profession without governmental interference. *See* Court Order dated September 30, 1994 (hereinafter "Order"), attached hereto as Exhibit 8. In addition, this Court held that defendants Conn and Najera were not entitled to absolute immunity for the alleged conduct. The current motions for summary judgment present no additional justification to disturb that ruling.

III

ARGUMENT

A. THE DEFENDANTS' BURDEN OF PROOF ON A MOTION FOR SUMMARY JUDGMENT

A party seeking summary judgment bears the burden of proof to establish that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.Proc. 56(c); *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978). The moving party must convince the court that there is an absence of evidence to support the opposing party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106

S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). Moreover, where, as here, a defendant moves for summary judgment based on an affirmative defense for which he bears the ultimate burden of proof, he must demonstrate by admissible evidence that there is no triable issue of fact as to each element of that affirmative defense. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).

In ruling on a summary judgment motion, the district court must exercise care to protect the parties, rights to have fact-based disputes decided by a jury, and avoid trial by affidavit. As the Supreme Court has stated:

Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

While early determination of the issue of qualified immunity is always encouraged, summary judgment doctrine is not to be skewed from its ordinary operation to give special favor to the defense. Thus, "[h]ere, as in any context, summary judgment for the movant is appropriate only if 1) there are no genuine issues of material fact, and 2) on the undisputed facts the defendant as movant is entitled to judgment as a matter of law." *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992).

B. THE DEFENDANTS ARE NOT ENTITLED TO ABSOLUTE IMMUNITY

As this Court has noted, there is a presumption that qualified, rather than absolute, immunity is sufficient to protect government officials and, therefore, absolute immunity is sparingly accorded. See Ex. 8, Order at p.175, citing, *Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 1939, 114 L.Ed.2d 547 (1991). This presumption should apply to each of the defendants in this case.

1. Defendants Conn and Najera

Defendants Conn and Najera apparently claim that they are entitled to absolute immunity in connection with the first search on the grounds that 1) they were acting in their roles as advocates while the search was being conducted, and 2) they did not personally participate in this search. In essence, these defendants would have this Court conclude that they should be cloaked with the full mantle of absolute immunity in a situation where they set in motion an investigatory process which culminated in a series of unconstitutional acts, had others carry out those acts at their direction, and then closeted themselves in what they believed to be the safe haven of a grand jury room while the unconstitutional conduct was committed. Defendants' argument is unsupportable in law and fact.

a. Conn and Najera Acted As Investigators

It is well-established that prosecutors are absolutely immune for conduct undertaken in their roles as advocates, including the presentation of evidence before a

grand jury. *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S.Ct. 2606, 2615, 125 L.Ed.2d 209 (1993); *Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 1941 n.6, 114 L.Ed.2d 547 (1991). Plaintiff does not dispute this principle. However, it is equally well-established that prosecutors acting in their roles as investigators, not advocates, have no such immunity. As courts have observed,

A prosecutor who assists, directs, or otherwise participates . . . in obtaining evidence prior to an indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacities of deciding which suits to bring and conducting them in court.

Marrero v. City of Hialeah, 625 F.2d 499, 503 (5th Cir. 1980); *Joseph v. Patterson*, 795 F.2d 549, 556 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987).

Here, this Court has already ruled that defendants Conn and Najera were acting in their roles as investigators in this matter. See Ex. 8, Order at pp 1777-178.⁵ Furthermore, as discussed below, substantially all of the allegations upon which the Court based this ruling, and its related ruling that defendants Conn and Najera participated in both the first and second searches, have been

⁵ The question of whether defendants Conn and Najera were acting as investigators or advocates when engaging in the conduct at issue here was fully briefed in the context of defendants' Rule 12(b)(6) motions. Plaintiff will not burden the Court by resubmitting the entirety of his previous argument, but would incorporate by reference his opposition to defendants' motion. See Plaintiff Gabbert's Opposition to Defendants' Motion to Dismiss at pp. 10-14, filed on August 26, 1994.

factually supported in discovery.⁶ In contrast, the defendants have presented no new evidence to substantiate their claim that they were acting as advocates and are, therefore, entitled to the extraordinary protection of absolute immunity.

b. Defendants Conn And Najera's Conduct Constituted Participation In The Unconstitutional Conduct

In its Order, the Court identified the particular conduct of defendants Conn and Najera which caused it to conclude these defendants were participants in the unconstitutional conduct at issue. Those allegations are now supported.

First, the Court pointed to the fact that plaintiff was delayed by defendants Conn and Najera "at the courthouse under the pretext of supplying plaintiff with a letter granting his client immunity, until plaintiff was served with a search warrant." See Ex. 8, Order at p.177. As defendant Conn conceded in his deposition, he brought plaintiff Gabbert and Ms. Baker up to his office to discuss a possible grant of immunity for Ms. Baker, indicated that he would have an immunity letter prepared, and instead caused a search warrant for plaintiff Gabbert to be issued. See Ex. 1, Gabbert Depo. at pp. 43-53; Ex. 3, Conn Depo. at pp. 71-73, 75, 82, 85, 86. Second, the Court noted that defendants "Conn and Najera were present when plaintiff was served with a

⁶ At minimum, as the evidence reveals, there are genuine issues of material fact in dispute with respect to these allegations.

search warrant." See Ex. 8, Order at p. 177. See also Ex. 3, Conn Depo. at p.89; Ex. 4, Najera Depo. at pp. 115-118. Third, the Court observed that defendants "Conn and Najera were present for the second search, and "viewed plaintiff's documents during the search, after Conn informed plaintiff that Special Master Oppenheim had determined nothing in the briefcase and files was privileged." See Ex. 8, Order at p.177. See also Ex. 1, Gabbert Depo. at pp. 21-23; Ex. 2, Baker Depo. at pp. 51-52; Ex. 3, Conn Depo. at pp. 94-97, 99-100, 135; Ex. 4, Najera Depo. at pp. 123-124, 130-131.

As this Court previously held, in language equally applicable to the current motion,

The conduct of Defendants Conn and Najera constitutes participation in the investigations. Further, . . . these investigations were not connected to Defendants' role as advocates, but, rather, were pre-indictment evidence-gathering more associated with police functions.

See Ex. 8, Order at pp. 177-178. As the Court concluded,

It seems clear that plaintiff's allegations, [now supported in the record], do state facts showing direction and participation by defendants. Moreover, it is apparent that such direction and participation would be considered a proximate cause of the constitutional deprivations which plaintiff alleges. Defendants' lack of causation defense thus fails.

Id. at p.181.⁷

⁷ The full extent of these defendants' participation in the unconstitutional acts complained of is discussed at greater length in Section C.2.a, *ante*.

2. Defendant Zoeller

Defendants Zoeller and Oppenheim claim quasi-judicial immunity, each on a different basis. Defendant Zoeller essentially claims that, because he was serving a search warrant which this Court has ruled was supported by probable cause, he is immune from liability for any constitutional deprivation that occurred during, or as a result of, the search. Zoeller cites to *Coverdell v. Department of Social & Health Services*, 834 F.2d 758 (9th Cir. 1987) for the correct proposition that a public officer may not be sued for conduct authorized pursuant to a valid court order. As even the *Coverdell* court recognized, however, such immunity can be extended only when there is no allegation or proof that, in executing the order, the defendant "exceeded its scope or acted improperly in any other way." *Id.* at 765 (emphasis added).

Here, the issue is no longer whether the search warrant itself was valid on its face, or whether Zoeller had the authority to serve it. Instead, the issue is whether defendant Zoeller and others served and executed the warrant in such a manner and at such a time that plaintiff's fourteenth amendment right to pursue his profession was violated. If indeed it was the defendants' aim to time the execution of the warrant so as to impede plaintiff's ability to represent Ms. Baker or it, in fact, did so, which conduct this Court has deemed a fourteenth amendment violation, then the propriety of the warrant

or the scope of the search under the fourth amendment is wholly irrelevant.⁸

3. Defendant Oppenheim

Defendant Oppenheim asserts that he is entitled to quasi-judicial immunity on the basis that, as a special master, he is entitled to the same immunity accorded to court-appointed receivers and conservators. Defendant Oppenheim's argument fails, based both on the California statute which governs special masters, as well as simple logic.

First, California Penal Code § 1524(d) states that, for the purposes of immunity against claims and actions, the special master "shall be considered a public employee, and the governmental entity which caused the search warrant to be issued shall be considered the employer of the special master. . . ." Thus, Oppenheim is entitled to no broader immunity than may be available to the other defendants in this case. At best, he can assert an entitlement to qualified immunity⁹ (a claim which also fails, as

⁸ Defendant Zoeller's argument, taken to its extreme, would give an officer carte blanche to engage in any number of assorted constitutional violations during the execution of a search, so long as a valid warrant was first obtained. Where, as here, there is at least a dispute as to the scope and intent of the illegal acts, the validity of the warrant will only confer qualified immunity in the cases of fourth amendment claims concerning the face of the warrant.

⁹ This is especially true insofar as counsel for defendant Oppenheim has indicated to plaintiff's counsel that Oppenheim is to be considered an employee of the Beverly Hills Police

discussed below.) Unlike court-appointed receivers or conservators, a special master's role, as legislatively defined, is limited and brief, requiring little in the way of the exercise of discretion or independent judgment. A special master's proper task, pursuant to Penal Code § 1524, should entail no more than the initial segregation of potentially privileged materials. On the other hand, a typical receiver or conservator acts as an agent of the court and is vested with wide-ranging discretion with respect to long-term and complicated matters, conduct to which judicial immunity logically must extend.

Moreover, it is axiomatic that a defendant will only be shielded from liability in connection with acts undertaken in the performance of discretionary as opposed to ministerial duties.¹⁰ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *Anderson v. Creighton*, 483 U.S. 635, 637-38, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987); *Davis v. Holly*, 835 F.2d 1175, 1178 (6th Cir. 1987); *People of Three Mile Island v. Nuclear Regulatory Commissioners*, 747 F.2d 135, 143 (3d Cir. 1984). As the Third Circuit has defined the two concepts:

'Discretionary-decisional' acts are those which involve significant decision-making that entails

Department for the purposes of this litigation. See Declaration of Melissa N. Widdifield. Therefore, under any set of circumstances, defendant Oppenheim is only entitled to the qualified immunity accorded to law enforcement officers.

¹⁰ Even if defendant Oppenheim's duties under section 1524 could be characterized as discretionary, this again entitles him not to absolute immunity, but merely qualified immunity. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

personal deliberation, decision and judgment. 'Ministerial-operational' acts involve the execution or implementation of a decision and entail only minor decision-making.

Davis v. Holly, 835 F.2d at 1178 (citations omitted). Here, even a cursory review of section 1524 reveals that its provisions are mandatory or ministerial. Accordingly, the court in *Geilim v. Superior Court*, 234 Cal.App.3d 166, 285 Cal.Rptr. 602 (1991), the leading case analyzing section 1524, observed that the statute's provisions are phrased as "requirements" and the procedures specified "must be followed." 234 Cal.App.3d at 172-73, 285, Cal.Rptr. at 605-607. As the California courts and legislature have recognized, the traditional policy grounds for extending absolute immunity do not apply in the present case, and, in the complete absence of relevant authority, this Court should not create such immunity.

C. THE DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

1. Plaintiff's Right To Pursue His Profession Was Clearly Established

All of the defendants assert that plaintiff's fourteenth amendment right to practice his profession was not clearly established. Defendants point to *Keker v. Procunier*, 398 F.Supp. 756 (E.D. Cal. 1975) as if it were the only recorded case which recognizes such a right, and labor mightily to distinguish *Keker* from the facts of this case.

As a threshold matter, as this court recognized in its order, a plaintiff need not unearth prior case law on identical facts to show that particular right is "clearly

established by law." Rather, the contours of the right need only be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official's action is protected by qualified immunity unless the very action in question has previously been held unlawful; but the unlawfulness must be apparent in the light of pre-existing law. *Anderson v. Creighton*, *supra*, 483 U.S. 635, 637, 107 S.Ct. 3034, 3039 (citations omitted).¹¹ This Court previously found that the fourteenth amendment right to practice one's profession "has been found to exist[.]" citing to *Keker*, *supra*, and *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). See Ex. 8, Order at p. 190.¹²

The right at issue here is more than "clearly established" – indeed, the judiciary's recognition of it predates the more contemporary categories of procedural and due process rights which came in vogue only in the last three decades. The *Keker* court, in readily acknowledging the existence of a "right to practice law," found as a matter

¹¹ The Ninth Circuit has recently reaffirmed the principle that the precise conduct in question need not have been previously held unlawful. Thus, in *Newell v. Sauser*, 95 Daily Journal D.A.R. 12365 (Sept. 15, 1995), the Court held that, based on generally recognized first amendment principles, it was "clearly established" that a prison inmate had a constitutional right to possess legal materials in his cell. *Id.* at 12366.

¹² Indeed, if the Court were convinced that, as a matter of law, such a right was *not* clearly established, then the Court surely would have dismissed the claim with prejudice on defendants' Rule 12(b)(6) motion.

beyond dispute that "the fourteenth amendment guarantees an individual the right to engage in any of the common occupations or professions of life," and that "such a right is both a 'liberty' and 'property' right protected from state deprivation or undue interference." *Id.* at 760. The court's holding was based on such longstanding Supreme Court decisions as *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625 (1923), *Green v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400 (1959), and *Board of Regents v. Roth*, *supra*. *Id.* The *Keker* court also relied on more recent federal law recognizing the rights of lawyers to practice their profession free of governmental interference. *Id.*, citing *Wounded Knee Legal Defense/ Offense Committee v. F.B.I.*, 507 F.2d 1281 (8th Cir. 1974). Thus, while the precise facts at issue in this case have, not surprisingly, never been addressed in a published opinion,¹³ the defendants' undue interference with plaintiff's practice of his profession constituted an obvious and unmistakable violation of his fourteenth amendment right, under law that has been clearly established for over fifty years.

Defendants struggle to distinguish the present case from those like *Keker*, cases in which the client had been criminally charged and thus had a sixth amendment right

¹³ It is worth noting that the conduct alleged in *Keker*, which the court readily identified as a fourteenth amendment violation in light of clearly-established law, was not nearly as egregious as the conduct at issue here. In *Keker*, the governmental "interference" amounted to little more than stuffy interview rooms and glass partitions. Here, by contrast, an attorney was physically separated from his client and prevented from communicating with her, during the very time period for which he was retained to give her counsel.

to counsel. This argument, however, is entirely irrelevant to the analysis at issue. Plaintiff Gabbert does not, and need not, assert that Ms. Baker had a sixth amendment right to counsel at the grand jury stage, in order for Gabbert's fourteenth amendment claim to stand.

Contrary to defendants' assertions, none of the cases cited by them, including *Keker*, hold that an attorney's right to practice his profession is limited to representation of a criminal defendant whose sixth amendment rights have attached. Indeed, in *Keker*, the court addressed the potential sixth amendment violation there as a separate and independent constitutional basis for the attorney's suit. *See Keker* at 760. The existence of a sixth amendment right was never viewed as a pre-requisite to the attorney's fourteenth amendment claim. *Id.* at 764-65. In short, the attorney's claim is clearly not "derivative" of the client's sixth amendment right to counsel, as defendants would disingenuously have this Court conclude.

2. Disputed Issues Of Fact Regarding Defendants' Conduct Preclude Summary Determination of The Reasonableness Prong of Qualified Immunity

In order to grant qualified immunity to defendants, the court must be able to rule, on undisputed facts, that a reasonable officer could have believed that defendants' conduct was lawful. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). Such a finding should be rare if the court has already determined that the law at issue was clearly established. As the Supreme Court has held, "if the law was clearly established, the immunity defense

ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, *supra*, 457 U.S. at 818-19, 102 S.Ct. at 2738.

The Ninth Circuit has recognized that the objective reasonableness prong of the qualified immunity inquiry may be resolved at summary judgment stage if the underlying facts are undisputed. *See Act Up!/Portland*, *supra*, at 872-73. However, the Court of Appeals also recognized that "the determination of what conduct underlies the alleged violation – what the officer and claimant did or failed to do – is a determination of fact." *Id.* at 873. Thus, if those facts are disputed, the objective reasonableness determination simply cannot be made on a motion for summary judgment. *Id.*

a. Defendants Conn and Najera

Defendants Conn and Najera's argument with regard to the reasonableness prong of qualified immunity appears to be twofold: First, the defendants' conduct was inherently reasonable to the extent they were in the grand jury room while the actual unconstitutional conduct was taking place. Second, their conduct was also reasonable because Ms. Baker asserted her fifth amendment privilege against self-incrimination in response to questions posed before the grand jury. Defendants' arguments miss the point. The only issue is whether plaintiff was denied access to his client because of the defendants' conduct and whether that conduct was reasonable under the circumstances. As demonstrated below, defendants Conn and Najera did, in fact, unreasonably interfere with and

caused others to interfere with Mr. Gabbert's right to advise Ms. Baker.

At the outset, plaintiff readily concedes that he was not entitled to accompany Ms. Baker into the grand jury room. No lawyer with even a basic understanding of criminal law would contend otherwise. What plaintiff Gabbert did have a right and obligation to do, as her lawyer, was be available to Ms. Baker should she seek his counsel, before, during and after her testimony. *See Ex. 2, Baker Depo.* at pp. 52-53, 57. Indeed, the defendants obviously understood plaintiff Gabbert to be present with Ms. Baker on the morning of March 21 for precisely that purpose – why else would they have allowed Ms. Baker to leave the grand jury room to attempt to consult with plaintiff. As defendant Najera acknowledged at her deposition, plaintiff Gabbert was at the courthouse for a single purpose – to represent Ms. Baker while she was to be testifying before the grand jury. *See Ex. 4, Najera Depo.* at p.86. Defendant Najera also understood that Ms. Baker had a right to leave the grand jury room during questioning to consult with plaintiff. *See Ex. 4, Najera Depo.* at pp. 109-110. Furthermore, these defendants were otherwise well aware of plaintiff Gabbert's role prior to causing the search to the extent they had earlier engaged in discussions with Mr. Gabbert regarding a possible grant of immunity for Ms. Baker. *See Ex. 3, Conn Depo.* at pp. 67, 70.

More significantly, Conn and Najera were also well aware that the search of plaintiff Gabbert would plainly interfere with his representation of Ms. Baker insofar as they 1) caused the issuance of the warrant, 2) caused Ms. Baker to be called into the grand jury room, and 3)

controlled the timing of both events. *See* Ex. 3, Conn Depo. at pp. 80, 82, 87-88 and Ex. 4, Najera Depo. at pp. 112-113. Indeed, defendant Conn has admitted that he caused the search warrant for Paul Gabbert to be executed shortly before Ms. Baker was to appear before the grand jury. *See* Ex. 3, Conn depo at pp. 87-88. That the timing of the search was strategically orchestrated to interfere with Mr. Gabbert's representation of his client becomes starkly apparent by the following testimony of defendant Conn:

-But I also knew by this point [referring to the meeting with Gabbert and Baker in his office on Monday morning before Baker testified] that we would be getting a search warrant. And once we had the warrant, there might be a change of strategy on his [Gabbert's] part.

See Ex. 3, Conn Depo. at p.75. Patently, any claim by defendants Conn and Najera that they did not plan, control or direct the search is absurd.

Defendants also contend that they objectively believed Ms. Baker was able to consult with plaintiff when she left the grand jury room because she, in fact, asserted her rights under the fifth amendment. However, whether or not these defendants held such a belief has absolutely nothing to do with the reasonableness of their conduct vis-a-vis plaintiff. These defendants had already engaged in conduct, and caused others (*i.e.*, Zoeller and Oppenheim) to engage in conduct, which was violative of plaintiff's fourteenth amendment right. Their subsequent, and mistaken, belief that perhaps no violation occurred - that they may have failed in their effort to separate plaintiff and his client - is hardly a basis for asserting that

their prior conduct was reasonable. Moreover, despite the defendants' erroneous belief that their constitutional foul caused no constitutional harm, it, in fact, did, as several witnesses have testified.

At the outset, as Ms. Baker advised both defendant Conn and Najera while she was in the grand jury room, she was unable to consult with plaintiff just prior to entering the grand jury room because he was taken to another room by the special master. *See* Exhibit 9, Grand Jury Transcript of Traci Baker at p.199; *see* also Ex. 2, Baker Depo. at p.40. More significantly, plaintiff Gabbert knew Ms. Baker needed to consult with him, but he could not speak with her before she was ordered into the grand jury room. *See* Ex. 1, Gabbert Depo. at p.25. Furthermore, when in response to the first question posed to her by Ms. Najera before the grand jury, Ms. Baker asked to confer with her counsel, but was prevented from doing so because plaintiff Gabbert was detained in a separate room where defendant Oppenheim was conducting the search. *See* Ex. 2, Baker Depo. at p.42. Ms. Baker, plaintiff Gabbert and defendant Conn's assistant, Patti Jo Fairbanks, have all testified that Ms. Fairbanks attempted to locate Mr. Gabbert for Ms. Baker. *See* Ex. 1, Gabbert Depo. at p.16; Ex. 2, Baker Depo. at pp. 42-46; and Exhibit 7, Excerpt of Deposition Transcript of Patti Jo Fairbanks at pp. 169-170. However, plaintiff was not able to consult with, or advise, Ms. Baker because he was still being searched by defendant Oppenheim. *See* Ex. 1, Gabbert Depo. at p.16; Ex. 2, Baker Depo. at pp. 42, 46. Ms. Baker was then ordered to return to the grand jury room. *See* Ex. 2, Baker Depo. at p.47.

It is true that, despite the fact that plaintiff Gabbert was not able to consult with her, Ms. Baker did return to the grand jury room and assert her rights under the fifth amendment. However, Ms. Baker did so not knowing what else to do. She assumed it was the most appropriate course to take under the circumstances, based solely on the "body language" of plaintiff Gabbert which she attempted to view through a partially obstructed door. See Ex. 2, Baker Depo. at pp. 45-47. Contrary to any understanding the defendants might have had, Ms. Baker's invocation of the fifth amendment was not based on the counsel of her attorney. In reality, Ms. Baker was reading from a card she had brought with her to rely on, if her attorney did advise her to assert the fifth amendment. See Ex. 2, Baker Depo. at pp. 48, 54. Ms. Baker had the written invocation with her because she was so nervous about appearing before the grand jury. *Id.*

In response to a second question by Ms. Najera, Ms. Baker again asked to confer with Mr. Gabbert. Again, plaintiff Gabbert was unable to advise his client because he was being searched. As Ms. Baker stated at her deposition:

And I came out [of the grand jury room] and proceeded to wait for what I perceived as a considerable amount of time, although it probably wasn't, in fact. I don't know. I was super, super, super nervous, real upset because I wasn't able to see Paul. I didn't know, in fact, whether I should have asserted the Fifth Amendment on the first question, and I was waiting, again. And I don't know if you've ever had to testify before the grand jury, but making 50 people, or however many people, wait for

you, constantly going out of the room made me even more upset. I was real upset waiting, and it seemed like an eternity. I recall the bailiff was there with me. And at that point - at some point, I was directed to go back into the room, that they could not wait any longer, that I had to go back into the room. And I said I needed to talk to my attorney. And I don't know if they said, "Too bad," but they said, "I'm sorry, ma'am, you have to go in." I don't know who said that to me.

See Ex. 2, Baker Depo. at pp. 49-50. And once again, having been denied direction from her counsel, Ms. Baker asserted her fifth amendment right, now knowing what else to do. *Id.* at p.50.

To escape liability, these defendants are now claiming that since they placed themselves in the grand jury room after setting in motion the course of events that deprived plaintiff of his constitutionally mandated right of access to his client, that the resulting damage somehow has no legal significance. The defendants' claim should be rejected by this Court, as should any claim that their conduct in this case was reasonable.

b. Defendants Zoeller and Oppenheim

Defendants Zoeller and Oppenheim claim their conduct was objectively reasonable based, again, on the validity of the search warrant. However, as discussed above, while the validity of the warrant might provide immunity from certain subsequent fourth amendment claims, it would not provide a basis for a reasonable officer to believe that the warrant could be executed in a manner

specifically designed to prevent an attorney from representing his client. Moreover, Zoeller and Oppenheim cannot claim, as they attempt to do, that they "reasonably relied" on the judgment of district attorneys Conn and Najera. Reliance on counsel is clearly not a valid basis for asserting objective reasonableness. *Melton v. City of Oklahoma City*, 879 F.2d 706 (10th Cir. 1989), cert. denied, 112 S.Ct. 296 (1991). As the Melton court held, "adopting the proffered position would immunize officials from liability via the simple expedient of consulting counsel." *Id.* at 731. Thus, where, as here, "the law is clearly established, there is no justification for excusing individuals from liability for their actions." *Id.*

A reliance on counsel defense is especially inappropriate here given the particular facts of this case. First, as an attorney with over sixty years of experience and who has acted as a special master for approximately ten years, defendant Oppenheim should be charged with at least a basic knowledge of due process rights. See Exhibit 6, Excerpt of Deposition Transcript of Elliot Oppenheim at pp. 159-161. Second, defendant Zoeller was well aware that plaintiff Gabbert was at the courthouse on March 21 for the purpose of representing Ms. Baker. See Ex. 5, Zoeller Depo. at pp. 137-138, 142-143. Defendant Zoeller was, of course, also well aware when he served the search warrant that Ms. Baker was about to testify before the grand jury since he served her with the grand jury subpoena. *Id.* Given this backdrop, these defendants should not be permitted to shield themselves with what amounts to a claim of vicarious immunity.

D. PLAINTIFF IS ENTITLED TO INJUNCTIVE RELIEF

In *City of Los Angeles v. Lyons*, 461 U.S. 95, 111, 103 S.Ct. 1660, 1670 75 L.Ed.2d. 675 (1983), the Supreme Court held that injunctive relief is available where there is "a sufficient likelihood that [the plaintiff] will again be wronged in a similar way." Here, it is entirely likely that plaintiff will "again be wronged in a similar way."

To begin with, Mr. Gabbert continues to represent Ms. Baker. He has been given no indication that the investigation of his client has terminated. See Declaration of Paul L. Gabbert. Indeed, defendant Najera stated in her deposition that despite three search warrants and one grand jury subpoena, the District Attorneys' office still had not obtained the document they sought. See Ex. 4, Najera Depo. at p.124. Presumably, defendants Conn and Najera, who are in charge of the ongoing retrial of Lyle Menendez, still seek to discover the evidence they previously tried to obtain from Ms. Baker. See Ex. 4, Najera Depo. at p.111. Moreover, the defendants apparently believe Mr. Gabbert may be in possession of this evidence. See Ex. 5, Zoeller Depo. at p.140. Furthermore, plaintiff anticipates that Ms. Baker will again be a witness at Mr. Menendez' trial. Given this situation, it is significantly likely that the identical scenario could repeat itself - that the defendants will again attempt to seize materials from plaintiff while he is actively engaged in representing Ms. Baker in an adversarial proceeding. Therefore, plaintiff is entitled to the injunctive relief he seeks.

IV

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court deny, in their entirety, the defendants' motions for summary judgment.

DATED: September 18, 1995

Respectfully submitted,

MICHAEL J. LIGHTFOOT
MELISSA N. WIDDIFIELD
TALCOTT, LIGHTFOOT,
VANDEVELDE WOHRLE
& SADOWSKY

/s/ Melissa N. Widdifield
By: MELISSA N. WIDDIFIELD
Attorneys for Plaintiff
Paul L. Gabbert

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California, at Talcott, Lightfoot, Vandeveld, Woehrle & Sadowsky, 655 South Hope Street, 13th Floor, Los Angeles, CA 90017. I am over the age of 18 and not a party to the within action.

On September 18, 1995, I served the foregoing document described as PLAINTIFF GABBERT'S CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS

FOR SUMMARY JUDGMENT on the plaintiff in this action by placing the true copies thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am readily familiar with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

Executed on September 18, 1995, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Irene Duarte
By: IRENE DUARTE

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Attorneys for Plaintiff
 Paul L. Gabbert

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NO. CV 94-4227-
	)	RSWL(Ex)
Plaintiff,)	
	)	DECLARATIONS IN
vs.	)	SUPPORT OF PLAINTIFF
	)	GABBERT'S
DAVID CONN, CAROL	)	CONSOLIDATED
NAJERA, ELLIOT	)	OPPOSITION TO
OPPENHEIM, AND	)	DEFENDANTS' MOTIONS
LESLIE ZOELLER,	)	FOR SUMMARY
Defendants.	)	JUDGMENT
)	
	)	Date: October 2, 1995
	)	Time: 9:00 a.m.
	)	Place: Courtroom 21
)	
)	

Plaintiff Paul L. Gabbert hereby submits the following declarations in support of his Consolidated Opposition to Defendants' Motions for Summary Judgment.

DATED: September 18, 1995

Respectfully submitted,

MICHAEL J. LIGHTFOOT
 MELISSA N. WIDDIFIELD
 TALCOTT, LIGHTFOOT,
 VANDEVELDE
 WOHRLE & SADOWSKY

/s/ Melissa N. Widdifield
 By: MELISSA N. WIDDIFIELD
 Attorneys for Plaintiff
 Paul L. Gabbert

DECLARATION OF MELISSA N. WIDDIFIELD

1, MELISSA N. WIDDIFIELD, declare as follows:

1. I am an attorney licensed to practice before all courts in the State of California. I am an attorney with the law firm of Talcott, Lightfoot, Vandeveld, Woehrle & Sadowsky and am one of the counsel of record of Paul L. Gabbert in *Gabbert v. Conn, et al.*, No. CV 94-4227-RSWL(Ex).

2. I make this declaration based on personal knowledge and could competently testify to the matters set forth herein if called to do so.

3. On September 7, 1995, I had a discussion with counsel for defendant Elliot Oppenheim, Scott D. MacLatchie. During that discussion, Mr. MacLatchie advised me that it had been determined by the City of Beverly Hills that defendant Oppenheim was to be deemed an employee of the Beverly Hills Police Department for the purposes of this litigation.

4. The following exhibits submitted in support of plaintiff Gabbert's Opposition to Defendants' Motions for Summary Judgment are filed concurrently herewith:

a. Exhibit 1 is a true and correct copy of an excerpt of the deposition of Paul L. Gabbert, taken on April 4, 1995.

b. Exhibit 2 is a true and correct copy of an excerpt of the deposition of Traci L. Baker, taken on May 4, 1995.

c. Exhibit 3 is a true and correct copy of an excerpt of the deposition of David P. Conn, taken on August 4, 1995.

d. Exhibit 4 is a true and correct copy of an excerpt of the deposition of Carol Najera, taken on August 3, 1995.

e. Exhibit 5 is a true and correct copy of an excerpt of the deposition of Leslie Zoeller, taken on August 1, 1995.

f. Exhibit 6 is a true and correct copy of an excerpt of the deposition of Elliot Oppenheim, taken on June 30, 1995.

g. Exhibit 7 is a true and correct copy of an excerpt of the deposition of Patti Jo Fairbanks, taken on August 10, 1995.

h. Exhibit 8 is a true and correct copy of this Court's Order on Defendant Conn and Najera's Motion to Dismiss, dated September 30, 1995.

i. Exhibit 9 is a true and correct copy of the transcript of testimony of Traci L. Baker before the Los Angeles County Grand Jury on March 21, 1994.

j. Exhibit 10 is a true and correct copy of the Superior Court transcript of the hearing on plaintiff Gabbert's Motion for Disclosure of Grand Jury Transcripts before the Honorable J. Stephen Czuleger, dated May 19, 1995.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18th day of September, 1995 at Los Angeles, California.

Melissa N. Widdifield
MELISSA N. WIDDIFIELD

DECLARATION OF PAUL L. GABBERT

PAUL L. GABBERT, being first duly sworn, declares:

1. That I am an attorney at law licensed to practice before all the Courts of the State of California. I make this declaration in opposition to defendants, motions for summary judgment. If called as a witness I could and would testify to the following facts based on my personal knowledge except as to those allegations made by me based on information and belief, and I believe those allegations to be true.

2. I represent Traci Baker as a potential witness in the case of *People v. Lyle Menendez*. I also represented her

in connection with a criminal investigation conducted by the Los Angeles County Grand Jury. In that matter, Ms. Baker was the target of a perjury investigation arising out of her testimony on behalf of the defense during the first *Menendez* trial. To my knowledge, the Grand Jury investigation arising out of the first *Menendez* trial has never been terminated.

3. The *Menendez* retrial is ongoing and is in the jury selection phase. To the best of my knowledge, Ms. Baker remains a potential witness on behalf of the prosecution in the *Menendez* retrial.

4. Based on the deposition testimony of Deputy District Attorney Najera in *Gabbert v. Conn, et al.*, No. CV 94-4227-RSWL, I am informed, believe and based thereon allege that the *Menendez* retrial prosecution team never obtained all of the evidence previously sought by them, specifically the complete original letter purportedly written from Lyle Menendez to Traci Baker. I believe, given the previous execution and compulsion of search warrants for Ms. Baker's home, Ms. Baker's person, my person, my briefcase and my office, that the District Attorney's office will continue its efforts to obtain the letter at issue.

5. If Ms. Baker is subpoenaed to testify or produce documents for any pending or future Grand or Petite Jury, I will represent her at that proceeding.

6. Given the past conduct of Deputy District Attorneys Conn and Najera, I am concerned that they will again attempt to interfere with my attorney-client relationship with Ms. Baker, as well as other future clients

who are similarly situated, thereby denying me my constitutional right to represent my clients and practice my profession.

I declare under penalty of perjury that the foregoing is true and correct, except as to those allegations made by me based on defendant Najera's deposition testimony, and I believe those allegations to be true.

Executed this 15th day of September, 1995, at Santa Monica, California.

/s/ Paul L. Gabbert
PAUL L. GABBERT, Declarant

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California, at Talcott, Lightfoot, Vandeveld, Woehrle & Sadowsky, 655 South Hope Street, 13th Floor, Los Angeles, CA 90017. I am over the age of 18 and not a party to the within action.

On September 18, 1995, I served the foregoing document described as DECLARATIONS IN SUPPORT OF PLAINTIFF GABBERT'S CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT on the plaintiff in this action by placing the true copies thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am readily familiar with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

Executed on September 18, 1995, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Irene Duarte
By: IRENE DUARTE

ATTACHMENT

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Attorneys for Plaintiff
Paul L. Gabbert

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NO. CV 94-4227-
Plaintiff,	)	RSWL(Ex)
v.	)	EXHIBITS IN SUPPORT
DAVID CONN, CAROL	)	OF PLAINTIFF
NAJERA, ELLIOT	)	GABBERT'S
OPPENHEIM, AND	)	CONSOLIDATED
LESLIE ZOELLER,	)	OPPOSITION TO
Defendants.	)	DEFENDANTS' MOTIONS
	)	FOR SUMMARY
	)	JUDGMENT
	)	Date: October 2, 1995
	)	Time: 9:00 a.m.
	)	Place: Courtroom 21

Plaintiff Paul L. Gabbert hereby submits the following exhibits in support of his Consolidated Opposition to Defendants' Motions for Summary Judgment.

DATED: September 18, 1995

Respectfully submitted,

MICHAEL J. LIGHTFOOT
MELISSA N. WIDDIFIELD
TALCOTT, LIGHTFOOT,
VANDEVELDE WOEHRLE &
SADOWSKY

/s/ Melissa N. Widdifield
By: MELISSA N. WIDDIFIELD
Attorneys for Plaintiff
Paul L. Gabbert

EXHIBIT 1

United States District Court
Central District of California

PAUL L. GABBERT,

Plaintiffs,

vs.

DAVID CONN, CAROL NAJERA,
ELLIOT OPPENHEIM, LESLIE
ZOELLER and DOES I through X,

Defendants.

No. CV944227
RSWL (Ex)

DEPOSITION OF PAUL L. GABBERT

Tuesday, April 4, 1995

ORIGINAL

[p. 2] UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,

Plaintiff,

vs.

DAVID CONN, CAROL NAJERA,
ELLIOT OPPENHEIM, LESLIE
ZOELLER and DOES 1 through X,

Defendants.

No. CV 94-4227
RSWL (Ex)

Deposition of PAUL L. GABBERT, taken on behalf of
Defendants, at 648 Kenneth Hahn Hall of Administration,
500 West Temple Street, Los Angeles, California 90012,
commencing at 1:10 P.M. on Tuesday, the 4th day of April,
1995, before ELIZABETH A. HINES, CSR No. 9236, pur-
suant to Notice.

Reported by: ELIZABETH A. HINES, CSR No. 9236

Job No.: 95-0404EAH

[p. 3] APPEARANCES

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For Defendants David Conn and Carol Najera:

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FRANSCCELL, STRICKLAND, ROBERTS &
LAWRENCE
BY: SPENCER C. KRIEGER, ESQ.
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Pasadena, California 91101

* * *

[p. 36] A. Well, I knew the 13th floor, and I think I have been in the grand jury sort of entryway although I can't recall when. I did not - I was not familiar with the layout of the various rooms. It wasn't familiar to me on March 21, 1994. I think I have been in there before. I don't remember when and it wasn't familiar to me.

Q. When a witness is going to testify before the grand jury, they have to check in with the bailiff; is that correct?

A. Yes. Correct.

Q. What time did Ms. Baker check in with the bailiff?

A. I think we actually checked in before her appointed time, which was either 8:00, 8:30, believe. I think we checked in probably around 8:25, if I'm correct that it was 8:30.

Q. Did she check in with the bailiff?

A. I think I checked in for her. I don't recall whether she was by my side or in the hall at the time I checked her in.

Q. Who was present when you checked her in?

A. Either myself and the bailiff or myself, the bailiff and Ms. Baker.

Q. Anyone else?

A. There may have been other clerical personnel [p. 37] behind the counter, but I don't remember anybody in the immediate vicinity of the bailiff's desk.

Q. Where was the bailiff's desk located in relation to the grand jury hearing room?

A. It's in an anteroom or a waiting room area. It has a little desk.

Q. And when you checked in with the bailiff, did he have to check Ms. Baker's name off of a list of some kind?

A. Probably. I don't recall.

Q. Okay.

A. He seemed - my recollection is that it registered.

Q. Did he mark it down on a piece of paper, log it in in some way?

A. He may have. I think so. I don't remember.

Q. What happened after you checked her in?

A. We went outside to wait in the hallway.

Q. And what happened after you went outside into the hallway?

A. Sometime after we were waiting outside, sitting on a bench, Ms. - I believe Mr. Conn and Ms. Najera showed up.

Q. Then what happened?

A. I think we said, "Good morning" ~~where~~ [or /s/ PLG] there

* * *

[p. 45] Amendment privilege against self-incrimination. We'd deal with it then.

Q. Did he make that statement during the phone conversation on March 21?

A. He made the comment during the phone conversation prior to March 17.

Q. Do you recall anything else the two of you discussed between you in that phone conversation where the issue of immunity was raised?

A. At one point - at one point he said something like, "We ~~had~~ [have /s/ PLG] bigger fish to fry than Ms. Baker."

Q. Did he say anything else that you can remember?

A. Not that I can remember at this time.

Q. So then on March 21st, the issue of immunity was raised again; correct?

A. Well, the answer to the question [is /s/ PLG], yes, ~~but~~ [and so /s/ PLG] because he used the term "use

immunity" - ~~and~~ [but /s/ PLG] he [had /s/ PLG] never used that term before.

Q. Who was present when he raised the issue of use immunity?

A. Ms. Baker, myself, Mr. Conn and, if Ms. Najera was there that original time when she came down again, she was present. I don't remember if she was present.

Q. To the best of your knowledge, did Ms. Baker [p. 46] overhear him when he had raised the subject of use immunity?

A. I don't know. There wasn't a big discussion. What happened was he said, "Let's go up to my office and talk about it."

So the topic was sort of broached. It was the first I heard of it. He invited us up to his office to discuss it, and we went up to his office to discuss it.

Q. Did Ms. Baker go with you?

A. Yes.

Q. On the way up to his office to discuss it, was - I believe this was on the 18th or 19th floor?

A. They were on the 18th floor, sir.

Q. Did Ms. Baker say anything?

A. Not to my knowledge.

Q. Did she react in any way to his - to the issue of use immunity?

MR. LIGHTFOOT: Are you asking did she react to him?

Q. BY MR. BRAZILE: In the presence of Mr. Conn when he made the statement, did she react in any way to his comment about use immunity?

A. I don't think so. I don't think she knew what it meant.

Q. Did she ask you any questions in the presence of Mr. Conn regarding immunity? This was before you get up [p. 47] to his office.

A. I understand the time period, Counsel.

The answer is: I don't know. She may have said, "What are we doing?"

Q. Did the two of you have any conversations on the way up to Mr. Conn's office while you were in the elevator?

A. I don't think so.

Q. So you get to the 18th floor; correct?

A. Yes.

Q. And do all of you go into Mr. Conn's office?

A. Yes.

Q. Who else was in Mr. Conn's office?

A. Some people walked in and out, but I think it was just the three of us.

Q. What's the first thing that was said when you got into Mr. Conn's office?

A. I don't remember.

MR. LIGHTFOOT: I'm assuming "the three" is the client, Mr. Gabbert and Mr. Conn?

MR. BRAZILE: Exactly.

Q. Is that what you understood the question to mean?

A. Yes.

Q. What was discussed in Mr. Conn's office?

[p. 48] A. What was discussed was a grant of use immunity by the District Attorney's office in the form of a letter in return for Ms. Baker's testimony before the grand jury. And the question of whether this would be - first of all, I said, "there is no such thing as use immunity in the state system. And there was some discussion.

And, I said, "If the DA says that ~~we are~~ [he is /s/ PLG] not going to use it, what about fruits?"

And he said, "[we /s/ PLG] would be free to use fruits or any other independent evidence against her."

I said - and this is not necessarily sequential - I said, "This is the first I have heard about this. I'll have to think about it. I need to discuss it with my client."

Q. Was she present?

A. Yes.

Q. When you had this discussion -

A. Yes.

Q. - about the use immunity?

A. Yes. And he said he would have his secretary prepare a draft of a letter.

Q. On use immunity?

A. Yes.

And we said we would go talk and think about it, and we left and went back to the 13th floor.

[p. 49] Q. So he didn't commit himself to giving the use immunity? It was kind of negotiations at that time?

A. He committed himself to writing a letter and presenting it to me in a formal offer, but it wasn't really - it was up to me on behalf of Ms. Baker to accept it or not.

And I told him - I believe I told him that my inclination was not to accept it.

Q. Did he say that he would draft the letter anyway?

A. Yes.

Q. How long did this meeting last between you, Mr. Conn and Ms. - your client, Ms. Baker?

A. Five minutes.

Q. What happened after the meeting?

A. Ms. Baker and I left, took the elevator down to the 13th floor.

Q. What time did you get back to the 13th floor after the meeting with Mr. Conn?

A. I recall it was still in the morning.

Q. Give me your best estimate. Before 10:00 or after 10:00?

A. I think it was around 10:00 because, as I recall, he didn't show up for the grand jury until after 9:00, even though the subpoena was for 8:30 is my [p. 50] recollection. I mean the subpoena says what it says, but he might not have shown up until 9:30. I think it's probably close to 10:00. Between 9 - I think it's between 9:30 and 10:00, but I could be off.

Q. When the two of you get back to the 13th floor, where do you go, you and Ms. Baker?

A. We stood around by the grand jury.

Q. For how long?

A. Until - until Mr. Conn, Ms. Najera and, I think, some other people came back down.

Q. What time was that?

A. I don't recall.

Q. Give me your best estimate.

A. It's around - I think it was probably about - I don't know - 15 minutes later.

Q. Before 10:30 or after 10:30?

A. I think it was before 10:30.

Q. What happens when these other individuals come back?

A. Conn came down. I think Najera came down, and I think, I'm not sure, if Oppenheim - and I didn't

know who Oppenheim was, but this fellow dressed in blue. Conn's secretary, I think, came down.

Conn came up to me, and I said - I don't know everything that was said, but the question by me was:

[p. 51] "Where's the letter?"

Q. What did he say?

A. "It's still being typed up."

Q. What else was discussed?

A. That's all I remember.

Q. You don't recall him saying anything else at that point?

A. No. [Yes. He talked about why he thought she was guilty. /s/ PLG]

Q. Did you say anything else to anyone at that point in time?

A. I might have looked at Ms. Baker and shrugged.

Q. What happened next?

A. I think Mr. Conn went in through the outer doors to the grand jury. I think Ms. Najera followed. If the other two people - the secretary and Oppenheim - came down, they went through the doors. I think either Ms. Baker and I followed or somebody came out and said - called Ms. Baker before the grand jury.

Ms. Baker needed to go to the bathroom and stated that. She then went to the bathroom, and if we were inside the grand jury anteroom or waiting room, we walked outside so she could go to the bathroom.

I was standing in the hall. Ms. Najera came out, stood in the hall with me and attempted to make some small talk with me.

[p. 52] Q. All right. Now, where was Ms. Baker at this point in time?

A. I presume in the ladies room.

Q. All right. Then what happened?

A. Ms. Baker returned from the ladies room. Ms. Najera, Ms. Baker and I went into the anteroom of the grand jury. And while we were standing there, Detective Zoeller came up and said, "Good morning, Mr. Gabbert."

Q. Where was Ms. Baker when Detective Zoeller came in and said good morning to you?

A. I believe she was standing adjacent to me.

Q. And where was your briefcase and your accordion file at that time?

A. I don't remember whether I was holding them or whether I had set them down on a conference table or a table in the anteroom.

Q. Now, this anteroom that you have testified to, is that also known as the witness room that was adjacent to the grand jury room?

A. I don't remember the name of it. It may have been the witness room.

Q. Was it the room where the bailiff was stationed?

A. Yes.

Q. What happened next?

[p. 53] A. I said, "Good morning, Detective Zoeller."

Q. Was the bailiff in that room at that time?

A. I don't remember. His desk was there. He was there most of the time. He may have been -

Q. What happens next?

A. Detective Zoeller then presented me with a search warrant, served a search warrant on me for my briefcase my person and Ms. Baker's person.

Q. What happens next?

A. I don't know if this is a precise chronology, but within seconds Ms. Baker was called before the grand jury.

Q. Who called her before the grand jury?

A. I don't know whether it was the foreperson or Mr. Conn. I was introduced to Mr. Oppenheim, who was the special master.

I said, "We'll need a private room." First I read the warrant. I was a little surprised. I was quite surprised and -

Q. Were you angry?

A. Absolutely.

When I said, "We'll need a private room," someone said, "We have one."

Q. Do you know who that was, who said, "We have one"?

* * *

[p. 56] Q. What happens once you get into this office room?

A. I told Mr. Oppenheim, among other things, that the only thing that I had in my possession, meaning on my person or in my briefcase, that was responsive to the search warrant, was two photocopied pages - I believe it was two pages of a letter that was supposedly three pages in length that was purportedly written from Lyle Menendez to Tracy Baker. And that the prosecution already had that letter. Mr. Oppenheim kept taking the search warrant and reading it. He must have read the search warrant on numerous occasions. He then said - directed me to permit him to search my briefcase.

Q. What did you say?

A. I produced this letter. I told him that, "This was all there was. Did he still want to search?"

He said, "Yeah."

So I started - I told him that I had privileged documents, files, pertaining to Ms. Baker and other clients.

Q. In the briefcase or the accordion file?

A. I had two files pertaining to other clients in the briefcase. I had Ms. Baker's file in the accordion file. As I stated previously, I may have had one of Ms. Baker's files in the briefcase. I can't recall if it [p. 57] was in the briefcase or the accordion.

He directed me, "Go ahead, I want to search even though notwithstanding what you said."

I then started to take items out of my briefcase. Sometime while this was happening, I was told that my client wanted to speak to me.

Q. Who told you that?

A. I believe it was Mr. Conn's secretary, the lady in pink. And there was, like, a knock on the door, and then the door opened, and she said this to me.

And I said, words to the effect, "I can't talk to Ms. Baker now. It will have to wait. I'm being searched."

Q. Did she tell you where Ms. Baker was?

A. She said - I don't know that she said it, but it was clear that Ms. Baker had to be outside of the grand jury because I couldn't talk to her in the grand jury. So by implication, it was clear to me that she wasn't in the grand jury, but I don't remember the woman stating where she was.

Q. Did the secretary ever say to you that Ms. Baker had ever gone before the grand jury while you were being searched?

A. No.

Q. Do you know whether or not she was before the

* * *

[p. 64] did it end, your best estimate?

A. The only thing I can tell you, I think it's between 10:00 and 11:15. I'm going to bracket that way because I wasn't looking at my watch.

Q. Were you wearing a watch that day?

A. Yes, absolutely.

Q. You think the search between you and Mr. Oppenheim ended sometime between 10:00 and 11:15; is that your best estimate?

A. Right.

Q. Now, when Mr. Conn's secretary comes in the door -

A. Knocks on the door of the office space where I am with Mr. Oppenheim.

Q. - does she ever say or make any reference to the fact that Ms. Baker is before the grand jury testifying?

A. She said, "Your client wants to talk to you."

And I said, "I can't talk to her right now," words to that effect. "I'm being searched."

And she says, "She has to talk to you right now." She either says, "Because she has to go back in the grand jury," or this was clear in the context that it was most urgent.

And I said, in effect, "That's tough. They [p. 65] created this situation. They can wait as long as it takes."

Q. So is it your testimony that Mr. Conn's secretary said to you that Ms. Baker was testifying before the grand jury?

MR. LIGHTFOOT: I'm going to object to that. Mischaracterizes what Mr. Gabbert said.

MR. BRAZILE: That's why I'm asking the question, Counsel. Is he saying it or is he not saying she said that? He can either say "yes" -

MR. LIGHTFOOT: Well, he said exactly what he thinks the secretary said to him when she knocked on the door. He's answered that question a number of times.

MR. BRAZILE: My follow-up question is this: I want to know, did he hear her say the words that his client, Ms. Baker, was testifying before the grand jury or had testified before the grand jury, anything along those lines?

THE WITNESS: Well, except for the fact that it's compound.

MR. BRAZILE: Well, let's make the record clear.

Q. First question, did Mr. Conn's secretary tell you, when she came into that room when you were being searched, that your client was testifying before the grand jury?

[p. 66] MR. LIGHTFOOT: In those words?

THE WITNESS: In those exact words?

Q. BY MR. BRAZILE: In those exact words.

A. I don't recall. I believe she may have said words to the effect that "she's wanted before the grand jury."

Q. All right. So then she never said to you that your client is testifying before the grand jury?

A. I don't think she said those exact words, no, sir.

Q. All right. Did she ever tell you that your client, Tracy Baker, is about to go testify before the grand jury when she entered that room?

A. Not those exact words.

Q. Now, what words did she use when she entered that room that you can recall?

A. No other words than those to which I have previously testified.

Q. Which words so we have a clear record here.

A. The ones on the record.

Q. I'm asking you to state it again.

A. "Your client wants to talk to you," or, "your client needs to talk to you."

"I can't talk to her now. She will have to wait."

[p. 67] Words to the effect, "it's urgent," or, "she can't wait," or, "she's wanted before the grand jury."

My saying, "that's too bad. They will have to wait. They created this situation. They will wait as long as it takes for me to finish here with the search."

Q. All right. Now, during the search, what materials in your possession did Mr. Oppenheim look through?

MR. LIGHTFOOT: There's a later search. This is the search in the room with Oppenheim we're talking about?

MR. BRAZILE: Correct. The very first search.

THE WITNESS: He looked through everything in my briefcase and in the accordion file.

Q. BY MR. BRAZILE: Did he look at anything else or search through anything else besides your briefcase and the accordion file?

A. Well, there were items in the briefcase -

Q. Right. I understand that.

Other than the briefcase and the accordion file, did he search through anything else?

A. No.

Q. How long did it take him to search through your briefcase?

A. I estimated approximately 20 minutes.

Q. How long did it take him to search through the

* * *

[p. 69] A. During

Q. Okay.

A. What happened was, Mr. Oppenheim took the two pages of the purported three pages, the photocopy, of the letter allegedly written by Lyle Menendez to Tracy Baker with him. And I took my briefcase with its contents including the two files - two other attorney-client files, which he read over my objection that contained privileged information, and my accordion file and went out in the anteroom.

Q. Mr. Oppenheim went out in the anteroom?

A. I went with him. I don't know who left the room, if we both left that room and went out in the anteroom.

Q. The anteroom, that's where the bailiff is located?

A. Right.

Q. What happened after you get out to the anteroom?

A. At some point shortly thereafter, Conn comes up. He says, "Mr. Oppenheim" or "the special master" - I forget how he referred to him - "has determined that none of the items in your briefcase are privileged; therefore, Detective Zoeller is going to search your briefcase as directed by the judge who issued the search warrant" - "by [p. 70] the magistrate that issued the search warrant."

I protested. I asked that it be delayed so that my counsel could appear. I said that, "If he had made a determination that there was nothing privileged in my briefcase, he was incorrect or in error."

And Conn indicated, I believe, with a gesture or with words - I forget which - that the search was going to take place or I could either open the briefcase and show them - that Zoeller was going to go through it himself with Conn, Najera or Zoeller looking on.

I started to repeat the procedure that I had gone through with Oppenheim, and I pulled out the two other files besides Ms. Baker's, the one file that contained the notes of my interviews with her.

And I told Zoeller, "There's nothing in here pertaining to the subject matter of the search warrant."

And Zoeller said, "I believe you. ‡ [and /s/ PLG] didn't look in those two" - Zoeller did not look in those two files, the other files, meaning Baker's accordion file and the file that contained her notes - I went through everything else. I opened it up. And at some point Conn

left and Najera and Zoeller stayed there and looked through and flipped through all of the documents in the Tracy Baker file and the other items in my briefcase except for the other two clients' [p. 71] files.

Q. When you came out of the anteroom or came out of the room with Oppenheim and entered into this anteroom or the waiting room where the bailiff was located, where was Tracy Baker at that time?

A. I don't know if she was there at that point or she came back in at some point. I believe she was present during the second search by Zoeller.

Q. But you are not sure of where she was when you first entered that room with Mr. Oppenheim after his search; correct?

A. I'm sure she was in one of two rooms.

Q. Which two?

A. She was either before the grand jury or she was in the anteroom.

Q. But you don't recall which one?

A. Right.

Q. How long does the second search take place or how long does the second search last?

A. Five minutes.

Q. Okay.

A. Approximately.

Q. And the second search takes place in the anteroom or the bailiff's room?

A. Correct.

* * *

[p. 80] put over to another date for Judge Cooper to rule on my motion to quash the grand jury subpoena, which was now finally before a judge.

Q. What was the ruling?

A. She didn't make one.

Q. Okay.

A. We went back outside. I conferred with my counsel, and I had my - and then Mr. Conn and eventually Mr. Zoeller were informed - they had since gotten a search warrant from my office - that we - pursuant to the compulsion of the warrant, we would make available the items or the item described in the warrant from my office.

And I was told that Zoeller went to my office and my secretary gave him the envelope. And then we went our respective ways.

Q. Okay. Are you aware of the order made by Judge ~~Luke~~ [Lew /s/ PLG] in this case on September 30th, 1994, with regards to the motion to dismiss, filed on behalf of David Conn and Carol Najera?

A. I know there have been various orders in the case, Counsel. I don't know what particular order you are referring to.

Q. On September 30th, 1994, he made an order with regards to a motion to dismiss, filed by defendants Conn and Najera which was granted largely in part. Most of it

* * *

[p. 82] have personal knowledge, no.

Q. BY MR. BRAZILE: So you are just aware of one occasion where she wanted to talk to you and couldn't talk to you because you were being searched; is that correct?

(Whereupon, a discussion was held between the deponent and his counsel out of the hearing of the reporter.)

MR. LIGHTFOOT: Why don't you ask the question again.

MR. BRAZILE: Would you read the question back.

(The requested portion of the record was read by the reporter.)

THE WITNESS: Yes.

Q. BY MR. BRAZILE: Yes, that's correct?

A. Yes.

Q. All right. Are you aware of any occasion where she wanted to talk to you before she went into the grand jury room to testify and she was not allowed to because you were being searched or were made unavailable?

A. Well, I believe she wanted to talk to me when I was being led away to be searched.

Q. Why do you believe that? What did she say, if anything?

A. I don't recall the contents of what she said, but I could tell you by the way she looked that she looked [p.

83] extremely upset and flustered, that she did not want to be left alone with the people that were investigating her for perjury.

Q. Did she ever say to you, as you were being lead [sic], "I have to talk to you. I need to discuss something with you?"

A. She may have. I don't recall.

Q. Do you recall any other occasion before she went in before the grand jury where she made a request to speak with you and she was not allowed to because you were unavailable for some reason?

A. No.

Q. Were there any occasions on March 21st, 1993 (sic) where you were prevented from giving legal advice to your client, Tracy Baker?

MR. LIGHTFOOT: Again calls for speculation on the part of the witness.

MR. BRAZILE: That he's aware of. All my questions are based upon his personal knowledge.

THE WITNESS: Other than I believe you meant 1994.

Q. BY MR. BRAZILE: I said - I'm sorry, 1994.

A. To be responsive to the question, other than the time I was being searched and the secretary said my client wanted to talk to me, no.

Q. Are you claiming any medical expenses as

* * *

[p. 99] Q. Do you remember seeing his secretary after you left the first search?

A. I remember seeing her at some point during that morning in the anteroom, but I don't specifically remember seeing her in the anteroom after the first search.

Q. So you didn't mention during - while you were in the anteroom, you didn't mention to David Conn that your client had wanted to speak to you earlier; is that correct?

A. That's correct.

Q. Is there a reason you didn't mention it to him at that point?

A. Yes. There are several reasons.

First of all, whenever I asked Mr. Conn for anything, the answer was, "No. We don't have to do it your way. We won't wait for your counsel. The search is going to take place now. We don't have to do anything the way you want to." And it was a series of edicts from Mr. Conn.

Also formerly when I had discussed things with Mr. Conn, he had misrepresented to me that he was typing up a use immunity letter or having his secretary do so when the truth is, in fact, they were typing up a search warrant.

So it wasn't exactly on my mind to talk to Mr. Conn about that particular manifestation of his [p. 100] impatience in my ~~mis~~ [/s/ PLG] representation of Ms. Baker, who he was now in the process of taking in front of a duty judge to be held in contempt.

Q. You did not feel it was important to speak to him or even mention the fact that you had not been allowed to speak to your client?

A. I thought lots of things were important, but this was not my first duty of business in that the point it -

Q. You didn't give any kind of insight into the fact that his secretary had mentioned anything to you while you were in the first search?

A. Not to my recollection, sir.

Q. Approximately how far away was David Conn's secretary when she made that statement?

A. I think she was at the door to a secretarial space or an office space. I guess she was about ten feet away.

Q. Did Mr. Oppenheim say anything to David Conn's secretary after she made her statement?

A. Not to my - not to my recollection.

Q. Did he make any kind of expression to the best of your knowledge?

A. Other than Mr. Oppenheim's gratuitous comments about various dress sizes ~~on~~ [in /s/ PLG] my personal calendar, he

* * *

IN WITNESS WHEREOF, I have hereunto subscribed
my name this 2nd day of May, 1995.

[p. 115] STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

That the foregoing transcript is a true and correct transcript of my shorthand notes so taken.

IN WITNESS WHEREOF, I have subscribed my name
this 11th day of April, 1995.

/s/ Elizabeth A. Hines
ELIZABETH A. HINES

EXHIBIT 2

United States District Court
Central District of California

PAUL L. GABBERT,

Plaintiff,

vs.

DAVID CONN, CAROL
NAJERA, ELLIOT OPPENHEIM,
LESLIE ZOELLER, and DOES I
through X, Inclusive,

Defendants.

No. 944227
(RSWL) (Ex)

DEPOSITION OF TRACI L. BAKER

Thursday, May 4, 1995

ORIGINAL

[p. 2] UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,

Plaintiff

-vs-

DAVID CONN, CAROL
NAJERA, ELLIOT OPPENHEIM,
LESLIE ZOELLER, and DOES I
THROUGH X, Inclusive,

Defendants.

No. 94 4227
(RSWL) (Ex)

DEPOSITION OF TRACI L. BAKER, taken on behalf
of Defendants, at 500 North Temple Street, Suite 648, Los
Angeles, California, at 2:30 p.m., Thursday, May 4, 1995,
before JENNIE A. ARNOLD, CSR No. 4182, pursuant to
Notice.

Reported by: JENNIE A. ARNOLD, CSR No. 4182

Job No. 95-0504JAA

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* * *

[p. 40] BY MR. BRAZILE:

Q How old is your boyfriend?

MS. PODBERESKY: Objection. Relevance.

THE WITNESS: He's 26.

BY MR. BRAZILE:

Q Do you know his date of birth?

A 6-1-68.

Q On March 21st, 1994, did you have to go and testify before the L. A. County grand jury?

A Yes.

Q Did you go to the L. A. grand jury on March 21, 1994?

A Yes.

Q Did anybody accompany you there?

A Yes.

Q Who?

A Mr. Gabbert.

Q Anyone else go with you?

A No.

Q What time did you arrive at the L. A. County grand jury on March 21, 1994?

A Again, I'm bad with dates, times. Specifically - I mean, not specifically, morning, early.

Q Before nine o'clock or after nine o'clock?

A That I arrived at the building?

[p. 41] Correct.

A Before nine o'clock.

Q When you arrived at the building, did you meet anyone?

A Yes.

Q Who did you meet?

A Mr. Gabbert.

Q Where did you meet him?

A I believe we first met on the 13th floor. I'm not sure. I shouldn't speculate. I don't recall exactly where we met for the first time.

Q Prior to arriving at the grand jury on March 21, 1994, had you received any advice from your attorney, Mr. Gabbert, legal advice?

MS. PODBERESKY: I am going to object. The question calls for attorney-client privileged information, and I instruct my client not to answer.

MR. BRAZILE: Okay, Counsel, just so the record is clear, part of Mr. Gabbert's claim is that he was not given access to his client and that infringed upon his Constitutional right. My question is not as to what the advice was, just whether or not she got any before she went into the grand jury. That's the question. Is that what you're instructing her not to answer?

MS. PODBERESKY: Yes.

[p. 42] MS. PODBERESKY: Let's go off the record a second. (The witness, her counsel, Plaintiff and Plaintiff's counsel leave the room and return shortly thereafter.)

MR. BRAZILE: Back on the record.

MS. PODBERESKY: My objection stands, but I will allow my client to answer.

THE WITNESS: Yes.

BY MR. BRAZILE:

Q Prior to arriving at the grand jury on March 21st, 1994, did you receive any legal advice from Mr. Gabbert regarding your testimony before the grand jury?

MS. PODBERESKY: I am going to object on the attorney-client privilege and the Sixth Amendment and instruct my client not to answer.

BY MR. BRAZILE:

Q How many conversations did you have with your attorney, Paul Gabbert, between March 18, 1994, and the morning of March 21, 1994, prior to giving your grand jury testimony?

A Was March 18 the day I was given the subpoena?

Q That would have been the day of the search, I think.

A Can you repeat the question?

MR. BRAZILE: Can you please read back the last

* * *

[p. 48] legal advice, not what the content of that legal advice was.

BY MR. BRAZILE:

Q How long did you have a discussion about legal advice during that 45-minute period of time?

A For clarification, it may not have been a full 45 minutes. It just did not exceed 45 minutes.

Q I understand.

A Probably a total of five to ten minutes.

Q Did the two of you have any discussions of a non-legal nature during that 45 minutes?

MS. PODBERESKY: I am going to object on the basis of attorney-client privilege and Sixth Amendment and instruct my client not to answer.

BY MR. BRAZILE:

Q What happened after you and Mr. Gabbert were out in the hallway for 45 minutes?

A At some point, I believe Mr. Conn appeared.

Q Did he say anything when he arrived?

A He and Mr. Gabbert spoke.

Q Do you overhear what they were saying to one another?

A Yes. I could have, yes.

Q What did they say?

A Specifically - they spoke, not at length, but I certainly couldn't recount what they said specifically here. [p. 49] They were - I'll stop there.

Q Did you overhear any part of their conversation?

A Yes.

Q What part of their conversation did you overhear?

A The one that stands out most is Mr. Conn and Mr. Gabbert were discussing whether or not Mr. Conn was

granting immunity. Also, Mr. Conn asked if I would surrender to arrest here in Los Angeles, or if they would have to arrest me in Orange County.

Q What else did Mr. Conn say?

A They were discussing issues of that nature regarding immunity and things about me in terms of surrender.

Q What did Mr. Gabbert say when Mr. Conn brought up the subject of immunity for you?

A I don't exactly recall.

Q What did Mr. Gabbert say when Mr. Conn brought up the issue of arresting you in Los Angeles County or Orange County?

A I honestly don't recall. That was stunning to me. From that point, I was a mess. I was shaking and completely scared. I don't remember.

Q What happened next?

A The next thing I can remember - and I don't know if this is in sequence - as we were sitting in Mr. Conn's office. I don't know if that is in sequence or not, as far

* * *

[p. 51] Q Did you overhear Mr. Conn say that, or did somebody tell you that?

A Honestly, I don't remember how that information came to me.

Q How long were you in Mr. Conn's office?

A Gosh. Again, I don't specifically remember. It would be between 10 and 25 minutes.

Q So after you leave Mr. Conn's office, where do you and Mr. Gabbert go?

A Back to the 13th floor. I'm not sure if we waited in the hall or were actually taken into - I guess for our purposes, I will clarify. When I say the waiting room, I mean the place where you wait to go into the grand jury. So it's possible we were brought into the waiting room at that point. But, again, I don't remember specifically.

Q What time is it when you and Mr. Gabbert return to the grand jury room from Mr. Conn's office?

A I really have no idea.

Q Was it before noon?

A I don't know.

Q Was it in the afternoon or morning?

A I would be inclined to say more toward the morning time.

Q So the two of you come back to the grand jury room. Then what happens?

[p. 52] A This is - all of this was so hazy to me that I'm going to apologize ahead of time for not knowing specifics. We were at - at some point I was directed by someone that I was going to have to go and wait for a period of time. And then, for some reason, Mr. Gabbert was taken out of that room to be searched by an older gentleman who I now know as Mr. Oppenheim, and I believe at the time he may have been introduced as that

man. And my recollection is that as I was being taken into the grand jury room Paul was being taken away to be searched.

Q By whom?

A By the older gentleman, Mr. Oppenheim.

Q Who took you into the grand jury room?

A I don't remember specifically at that time. I remember there was an African American woman that was the first face I saw as I went into the room.

Q Prior to going into the grand jury room on March 24, 1994, had you had an opportunity to consult with your attorney, Mr. Gabbert, about your grand jury testimony before you went in to talk to them?

MS. PODBERESKY: I am going to object on Sixth Amendment grounds and attorney-client privilege. Can I have a moment?

(Witness's counsel confers with Plaintiff out of the hearing of the

* * *

[p. 57] A Yes.

Q Who directed that question to you?

A I shouldn't speculate.

Q Give me your best estimate as to who that was.

A I know it was either Najera or Conn. But I was just nervous. I don't remember exactly who it was at this time. One of them.

Q What question did they direct to you?

A Something to the effect, was I acquainted with or did I know Lyle Menendez.

Q Did you answer that question?

A No.

Q Why not?

A I wanted to be clear as to whether or not that was something I could answer. So I asked for a moment to confer with my attorney.

Q Whom did you make that request to?

A I said it into the microphone. But I assume the Jury foreperson is the woman I was technically directing it to.

Q So you made a request to the Jury foreman that you wanted to confer with your attorney, Paul Gabbert; is that correct?

A Yes.

Q Were you allowed then to go confer with your [p. 58] attorney, Paul Gabbert?

A I was allowed to leave the room. When I got out of the room, Paul was not there. I sat for a moment, feeling very agitated, got up, and went out into - there is an area where you first come in some glass, double doors where there is a place for a secretary-type person or a receptionist to sit - and I encountered a heavyset woman and I asked her did she know where Paul was. I don't remember if she actually said she knew where he was,

but she indicated in some manner she would try to assist me in finding him.

Q Was she an attorney?

A I don't know.

Q Did she find Mr. Gabbert?

A She located him. And my recollection is that he was across toward the back of the large room in which the heavyset woman was seated in the front of this room. I saw Mr. Gabbert across the room, and I recall him - he was taking his jacket off is the memory I have fixed in my mind - and somehow, either verbally or using body language, or some way, I got the indication from him that I should go ahead and go back in and assert my Fifth Amendment right.

Q How did you get that indication from Mr. Gabbert?

A At this time I don't remember. I just remembered that that is - somehow that is what was conveyed to me from him.

[p. 59] Q Did the two of you make eye contact?

A I don't recall.

Q Did he say anything to you?

A Again, I don't recall specifically. I just know that's the action I took.

Q You say he had his jacket off; correct?

A Yes.

Q Was anyone with him?

A As far as speculating -

Q Did you see anyone in his presence?

A No, I didn't. Because I was only given partial view, from the vantage point I was standing into the room.

Q Now, this older gentleman that you said - this Special Master that was with Mr. Gabbert, did you see that when you had this picture of Mr. Gabbert with his coat off?

A I don't recall seeing him in the room. I do remember seeing him in the waiting area. I do remember him because he was dressed all in blue.

Q So when you asked the grand jury could you go and confer with your attorney, did you confer with your attorney?

A At that point, no.

(The witness confers with her counsel out of the hearing of the reporter.)

THE WITNESS: No.

[p. 60] BY MR. BRAZILE:

Q You did not; correct?

A That's correct.

Q Even though you made a request to do so; correct?

A Yes.

Q And the reason you did not consult with your is what?

A He was in another room subject to a search.

Q Could you see anyone searching him?

A Not that I recall.

Q Did you ask anyone to convey a message to him?

A Yes. I initially asked the heavysset lady - she was dressed in pink, if you can go that far back - I don't remember who it was - if she could get my attorney, I needed to ask him something regarding whether or not I could answer a question. I wasn't specific with her, but I asked for her assistance.

Q Again, what did she tell you?

A Again, I don't remember. I had the recollection that she was in some way trying to be helpful to see that perhaps she would go to see if she could find him, or she called in that direction or something.

Q Now, this room that you saw Mr. Gabbert in, where were you when you were looking at him in this room?

A Are you familiar with where I am referring to?

[p. 61] Q I believe so, yes.

A Okay. I think there are double glass doors that you walk into, and you go to your right to get into the actual waiting area. There is a front desk reception area, and there's a hallway here (indicating). I was standing far enough back so I could see her typewriter and other

office items back there. I was standing right about here (indicating,) and my recollection is that he was standing in a room somewhere in this neighborhood (indicating).

Q Did you see anyone else in the room that he was in at that time, that being Mr. Gabbert? Was anyone else in the room with him at that time?

A I heard him speaking, but I didn't see anybody in the room with him.

Q What was he saying?

A I don't know.

Q After you see Mr. Gabbert, and you don't communicate with him, what did you do next?

A Somehow communication took place, at least on my end. I felt that I should go back in and assert my Fifth Amendment right, although I can't specifically tell you whether it was through body language or verbal or what. But I went back into the room and asserted my Fifth.

Q Prior to you going back in the room to assert the Fifth Amendment right, did Mr. Gabbert say anything to you?

[p. 62] A Not that I can recall.

Q Did you say anything to him?

A I believe the heavysset woman was the conveyor of information, as far as my end goes.

Q Did you ever see her communicating with Mr. Gabbert or say anything to him?

A I believe she either moved to the room or yelled in his direction, "Your client needs to speak with you," or something of that nature.

Q Did she get his attention?

A Yes.

Q Did he look at you?

A I think that's how I was able to see him. Because the vantage point that I was at, I couldn't see clearly the things in the room. I believe he poked his head out.

Q What did he say when he poked his head out?

A Again, I'm certainly not quoting him, and this is just a general recollection, that, "Tell her that I can't see her now, or I can't help her now, I am being searched," or something like that. That's what I think was the information conveyed.

Q Did he say anything else to you at that point?

A Not that I recall.

Q How far away from Mr. Gabbert were you when he [p. 63] said, "I can't help her right now; I'm being searched"?

A I have no idea, in terms of feet.

Q Give me your best estimate.

A I can use this room to show you.

Q Sure.

A I would probably maybe have been to that corner, farther away than that wall even. Maybe, again, a quarter

of this room more away. So this room, plus a quarter, maybe.

Q 40 to 30 feet away; is that accurate?

A Honestly, I'm really not good - I don't read maps, and I have no concept of space.

Q What if we do it by car lengths? How many car lengths would you say?

A Maybe three to five.

Q Car lengths?

A Yes.

Q So what happens next?

A I go back into the grand jury room. They reask me the question.

Q What question did they ask you?

A To the effect, am I somehow acquainted with, do I know Lyle Menendez.

Q Who asked that question?

A Again, either Miss Najera or Mr. Conn.

[p. 64] Q And what did you say at that point?

A I had a card that I had - because I was nervous - written down, "I respectfully decline due to the fact that it may tend to incriminate me . . ." The Fifth Amendment assertion, whatever that legal item is asserted it.

Q Who gave you that card?

A I had the card myself. Because I tend to be nervous, and I wanted to make sure I was complying with the rules.

Q Prior to going into the grand jury room and testifying, did Mr. Gabbert ever tell you that if you didn't understand a question, just to take the Fifth Amendment?

MS. PODBERESKY: Objection. Calls for attorney-client privileged communication. I instruct her not to answer.

BY MR. BRAZILE:

Q Prior to going into the grand jury room and testifying, did you have any discussion with Mr. Gabbert about taking the Fifth Amendment?

MS. PODBERESKY: I'm going to assert the attorney-client privilege communication and Sixth Amendment and instruct my client not to answer.

MR. BRAZILE: So that the record is clear, and we can have a clear record for the magistrate, the question to your client is: Prior to her going in to testify before the grand [p. 65] jury, did she have any discussions with Mr. Gabbert about taking the Fifth Amendment?

MS. PODBERESKY: And I am posing the objection I just stated on the record and instructing my client not to answer.

MR. BRAZILE: That's fine. That's all I need.

Q So when you go back in and take the Fifth Amendment, what happens?

A They ask me a very similar question, and, again, I asked for a moment with my attorney.

Q So do you go outside the grand jury room at that point?

A Yes.

Q What were your words?

A I said, "May I have a moment with my attorney." Don't quote me on that. That's what I think I said.

Q Who did you state that to?

A Again, into the microphone, probably directed at the jury foreperson.

Q What happened after you made that statement?

A Again, the African-American woman got up and let me out of the room. And I came out and proceeded to wait for what I perceived as a considerable amount of time, although it probably wasn't, in fact. I don't know. I was super, super, super nervous, real upset because I wasn't able to see Paul. I didn't know, in fact, whether I should have asserted [p. 66] the Fifth Amendment on the first question, and I was waiting, again. And I don't know if you've ever had to testify before the grand jury, but making 50 people, or however many people, wait for you, constantly going out of the room made me even more upset. I was real upset waiting, and it seemed like an eternity. I recall the bailiff was there with me. And at that point - at some point, I was directed to go back into the room, that they could not wait any longer, that I had to go back into the room. And I said I needed to talk to my attorney. And I don't know if they said, "Too bad," but

they said, "I'm sorry, ma'am, you have to go in." I don't know who said that to me.

Q So you didn't get a chance to speak to Mr. Gabbert?

A No. The second time I came out.

Q So you go back into the grand jury?

A Yes.

Q Then what happens?

A Because I didn't know what else to do, I, again, asserted the Fifth Amendment, only because the question was very similar to the first.

Q So what happens once you asserted the Fifth Amendment privilege the second time?

A I believe they began to ask me another question which I don't recall the content of the question, and as I [p. 67] was saying the sentence, "May I have a moment with my attorney," Mr. Conn got up and was very upset. I don't know what caused him to be upset, but he started discussing something with the jury foreperson that he was moving to hold this witness in contempt because I didn't produce something.

Q So at is that point, was that the third or fourth time that you had asserted the Fifth Amendment privilege?

A I had only asserted the Fifth Amendment twice. The third occasion that they began to ask me a question, of which I don't remember the exact content, I was about to ask for a moment with my attorney - which would

have been the third time – that I asked for a moment with my attorney, and Mr. Conn got up and was angry about something and said that he was going to hold me in contempt of court which then, of course, added to my already hysterical nature at that time because I was whacked out. So –

Q Then what happened?

A I think I was let out of the room. Well, she admonished me, and I was let out of the room, and I was in the waiting area. By then, I believe Mr. Gabbert was back with me. Someone, I think Mr. Zoeller, delivered – no, I take that back – I'm not clear on this at all. At this time – I don't know if it's correct in time sequence, this is my memory – Mr. Gabbert was searched, his physical stuff, by Mr. Zoeller. And I believe Mr. Conn and Miss Najera were [p. 68] there for a period of time, although it's not my feeling they were there the entire time. They looked through Mr. Gabbert's personal –

Q When you say "they," who are you referring to?

A I will rephrase that. Well, "they" would be Mr. Zoeller, and I think Miss Najera and Mr. Conn were in the room. Mr. Zoeller was physically looking through Mr. Gabbert's briefcase and his man's purse. It's a purse. It wasn't a woman's purse.

Q When you went in to testify before the grand jury on the first occasion, did Mr. Gabbert ever indicate to you where he would be when you were testifying?

A Not that I recall.

Q Did he ever tell you, prior to you going in to testify before the grand jury, that he would go in the grand jury room with you?

MS. PODBERESKY: I am going to object. It calls for attorney-client privileged information, and instruct my client not to answer.

BY MR. BRAZILE:

Q Did you have any understanding whatsoever as to where Mr. Gabbert would be when you were in the grand jury testifying?

A Yes.

Q Where did you believe he would be?

[p. 69] A In the waiting area.

Q Did he tell you he was going to be in the waiting area, or did someone else tell you he would be in the waiting area.

MS. PODBERESKY: I am going to object to the extent it calls for attorney-client privilege and instruct my client not to answer.

BY MR. BRAZILE:

Q Why did you believe that he would be waiting for you in the waiting area while you were testifying before the grand jury?

(The witness confers with her counsel, Plaintiff and Plaintiff's counsel out of the hearing of the Reporter.)

MS. PODBERESKY: Can you repeat the question?

BY MR. BRAZILE:

Q Why did you believe that Mr. Gabbert would be waiting for you in the waiting room when you were testifying before the grand jury?

A Because I knew that he was not allowed to be in there with me. I believed he would be somewhere close by.

Q Let's go back to when you testified before the grand jury on the first occasion.

Did you tell anyone in the grand jury room when you first went in to testify that you were not able to speak

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[p. 73] that effect. I don't know if I used the exact words you are using. Because it was a long time ago, and I was super nervous. Again, I was reading off a card. So I think since my mind wasn't really generating the words is why I don't remember.

BY MR. BRAZILE:

Q Were the words "Based upon the advice of counsel" on the card that you were reading off of?

A Something similar to those words. If not, in fact, those, something very similar, I think.

Q And you had that card with you in the grand jury room?

A Yes.

Q Do you still have that card with you?

A No.

Q Do you know where it is?

A No.

Q So then you go out of the grand jury room, and after you tell them that you will not answer the question, you go back out into the waiting room; correct?

A This is after the first question?

Q After the first question.

A Okay. They asked me if I was acquainted with, can I have a moment with my attorney -

Q Right.

* * *

[p. 76] door.

Q Then what happens?

A They asked me the question. I said, "May I have a moment with my attorney." Mr. Conn got up, and I don't know what he said, but I recall him saying that he was moving to hold me in contempt. At that point, the Jury forewoman said whatever she needed to say, admonished me, and I was taken out into the waiting area again.

Q Then what happened?

A I think this is where Mr. Zoeller was searching Paul's personal items - briefcase and purse. After that, I was ordered down the hallway by the bailiff. Paul was not with me. He was gathering - he was not with me. I don't know what he was doing. The bailiff, court reporter, African-American gentleman, court reporter, some

other folks were coming. We were being taken to another courtroom where a contempt of court hearing was to be taking place.

Q Then what happened?

A We were taken into the courtroom. Paul eventually caught up with us. Mr. Gabbert eventually caught up with us, and he wasn't allowed to go in the courtroom at first. I was sitting there alone with Mr. Conn. We were just waiting around for awhile. Eventually Mr. Gabbert was allowed to come in the room, and I think that's when what's called a hearing or proceeding took place.

* * *

[p. 90] Q At some point the judge took the bench?

A Yes.

Q And did Mr. Gabbert have an opportunity to address the Court on your behalf?

A Yes.

Q And then was the hearing postponed or continued so the judge could do some research? Was that your impression?

A Yes.

Q Did it ever reconvene?

A No.

Q Did you feel disadvantaged in any way by not being able to access Mr. Gabbert on those occasions when you went outside the Jury room and did not have immediate contact with him?

A Yes, I did.

Q How so?

A Well -

(Witness confers with her counsel out of the hearing of the reporter.)

My state of mind when I got there that morning was, "Wow, I'm being investigated" Not investigated, I take that back. "I have to go before the grand jury and answer questions." That scared me. I don't know what that is. It sounds real scary.

[p. 91] Mr. Conn made a statement in my presence, would I submit to arrest in the hallway, or would I have to be arrested in Orange County. From that point on, I was super scared because I really thought I was going to be arrested. Then, we're expecting, I think, to have an immunity thing brought down. Instead, suddenly there's a search warrant. My attorney is taken away from me. And I was shaking, really upset, I don't know what to do. I just know I'm going to go into a room with a bunch of people I don't know that are going to ask me questions, and I don't know what I should say. So I come out looking for the only rock that I have for help, and he wasn't there. So I was stuck with some bailiff guy and nobody sitting there. I'm not saying that to be dramatic. That is exactly how I felt. I was indeed at a disadvantage, in that it was highly stress inducing. The thing that made me most upset was I thought I was going to be arrested. That was really - I was thinking "Who has money who can bail me out," you know. That was all that was going through my head, not "What am I going to say," thinking

about anything, but "Who in the Hell is going to bail me out?" And that's where my state of mind was.

Q Other than the emotional disadvantage which you just described, substantively what disadvantage, if any, was there with regard to how you ultimately performed before the grand jury had Mr. Gabbert been available to you, or in this [p. 92] case he had not? Was your Performance before the grand jury you believe in any way different as a result of your not meeting him outside?

MS. PODBERESKY: Objection. It calls for a legal conclusion. I am going to instruct her not to answer that.

MR. MacLATCHIE: I don't want a legal conclusion. I just want to know how she feels her performance was disadvantaged, that's all. Just something within her own personal knowledge.

MS. PODBERESKY: It calls for speculation. I'm going to instruct her not to answer that question.

MR. MacLATCHIE: Okay. I have nothing else.

MR. BRAZILE: I have a few more.

FURTHER EXAMINATION

BY MR. BRAZILE:

Q You said that when you were there, you were super nervous, right, when you were there before the grand jury?

A Yeah.

Q And were you super nervous because you were there or because you knew something?

MS. PODBERESKY: Objection.

MR. BRAZILE: What's your objection?

MS. PODBERESKY: Vague, ambiguous, argumentative. Assert the Fifth Amendment right and instruct her not to [p. 93] answer the question.

BY MR. BRAZILE:

Q Prior to March 21, 1994, had you ever been acquainted with Lyle Menendez?

MS. PODBERESKY: Objection. We have been through that line of questioning. I am going to instruct her not to answer that question.

BY MR. BRAZILE:

Q On March 21, 1994, did you even know who Lyle Menendez was?

MS. PODBERESKY: Objection. Same objection.
BY MR. BRAZILE:

Q Isn't it true, other than taking the Fifth Amendment before the grand jury, you didn't state anything else before the grand jury?

MS. PODBERESKY: Objection. That misstates the testimony here today. She has indicated that she repeatedly asked to consult with her counsel.

BY MR. BRAZILE:

Q Other than asking to consult with your counsel, isn't the only thing you said before the grand jury was

that you were taking the Fifth Amendment based upon the advice of counsel?

A Other than, also, my name. I gave my name.

MR. BRAZILE: I don't have any further questions.

[p. 94] MR. MacLATCHIE: Just one question.

FURTHER EXAMINATION

BY MR. MacLATCHIE:

Q Why did you feel disadvantaged by not being able to immediately access Mr. Gabbert when you had with you that card that articulated what you responded when you were asked the questions?

(The witness and her counsel confer out of the hearing of the reporter.)

MR. MacLATCHIE: For the record, I would really like to get the witness's answer, and not counsel's.

MS. PODBERESKY: For the record, I would like to consult with my client to determine whether her answer is going to call for any kind of attorney-client privileged information.

(The witness and her counsel confer out of the hearing of the reporter.)

MS. PODBERESKY: Go ahead and answer.

THE WITNESS: Well, I had no prior knowledge of what questions would be asked to me by the grand jury, and even if I - I'm not a lawyer, you know, I'm a waitress. I need somebody to help me along. You just

don't throw me into a [p. 95] room and expect me to know what's happening

BY MR. MacLATCHIE:

Q When you say you had no prior knowledge of the questions being asked, I would assume you had no knowledge of the specific questions they would be asking you, word-for-word; is that correct?

A That, and really not a whole lot of indication of what else either.

Q Did it come as a complete surprise to you, out of the blue, that you were asked about your knowledge of Lyle Menendez?

(Witness confers with her counsel out of the hearing of the reporter.)

MS. PODBERESKY: You can answer the question.

THE WITNESS: No. It was not a complete surprise.

MR. MacLATCHIE: I have nothing further.

MR. BRAZILE: Well, I have nothing further either.

Can we stipulate that the court reporter will be relieved of her duties under the Code; that the original of the deposition transcript will be sent to Miss Baker's attorney; that within 30 days of receipt all counsel are to be notified of any changes to the deposition transcript. If we are not so notified within 30 days of receipt, there are to be no changes to the deposition transcript; that the witness will sign the transcript under penalty of perjury;

* * *

[p. 97] STATE OF CALIFORNIA)
) ss.
 COUNTY OF LOS ANGELES)

I declare under penalty of perjury that I have read the foregoing transcript, I have made any corrections, additions, or deletions that I was desirous of making in order to render the within transcript true and correct, and

IN WITNESS WHEREOF, I have hereunto subscribed my name this 22 day of June 1995.

/s/ _____
 WITNESS

[p. 98] STATE OF CALIFORNIA)
) SS
 COUNTY OF LOS ANGELES)

I, JENNIE A. ARNOLD, CSR No. 4182, a Court Reporter in and for the County of Los Angeles, state of California, do hereby certify:

That prior to being examined, TRACI L. BAKER, the witness named in the foregoing deposition, was by me duly affirmed to tell the truth, the whole truth, and nothing but the truth;

That the said deposition was taken before me pursuant to Notice at the time and place therein set forth and was taken down by me; in shorthand and thereafter transcribed into typewriting under my direction and supervision; that the said deposition is a true and correct record of the testimony given by the witness:

That it was stipulated by counsel that said deposition may be read, corrected and signed by the witness under penalty of perjury.

I FURTHER CERTIFY that I am neither counsel for nor in any way related to any party to said action nor in any way interested in the outcome thereof.

IN WITNESS WHEREOF, I have subscribed my name this 10th day of May 1995.

/s/ Jennie A. Arnold
Jennie A. Arnold

No. 97-1802

Supreme Court, U.S.

FILED

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In The
Supreme Court of the United States
October Term, 1998

DAVID CONN and CAROL NAJERA,

Petitioners,

vs.

PAUL L. GABBERT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX
VOLUME III, PAGES 483 to 696

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EXHIBIT 3**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

PAUL L. GABBERT,)	
Plaintiff,)	
vs.)	
DAVID CONN, CAROL NAJERA,	)	No. CV 94
ELLIOT OPPENHEIM,	)	4227 RSWL(Ex)
LESLIE ZOELLER)	
AND DOES 1 THROUGH X,)	
Defendants.)	

DEPOSITION OF DAVID P. CONN

**Los Angeles, California
August 4, 1995**

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

PAUL L. GABBERT,)	
Plaintiff,)	
vs.)	
DAVID CONN, CAROL NAJERA,	)	No. CV 94
ELLIOT OPPENHEIM,	)	4227 RSWL(Ex)
LESLIE ZOELLER)	
AND DOES 1 THROUGH X,)	
Defendants.)	

**DEPOSITION OF DAVID P. CONN, taken
on behalf of the Plaintiff, at 655 South Hope**

Street, Los Angeles, California 90017, commencing at 11:20 A.M., Friday, August 4, 1995, pursuant to Notice, before Joanne Hokyo, CSR #9169.

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* * *

[p. 60] Q And did you have a conversation with Mr. Gabbert at that time?

A Yes.

Q And did he express concern, again, to you, on the morning of the 21st, that her producing any documents responding to questions in his view violated her 5th Amendment privilege?

A I don't remember him saying that that morning.

Q You don't remember that?

A No.

Q There was no conversation about that?

A No. There was a conversation about him coming up to my office so we could talk further. And that's what we did. We went up to my office.

Q Before you left to go up to your office, was the discussion about a possible grant of immunity?

A I don't know that that was discussed beforehand. Reference was made to that in my office. I recall that.

Q But you don't have a recollection of whether it was discussed downstairs on 13?

A No.

Q Is it your recollection that there was nothing of substance discussed on the 13th floor?

[p. 61] A Well, what I do recall was when we inquired about the documents and, as was indicated in the search warrant, the conversation took place at that time where he made reference to having the documents.

Q Documents that were the subject of the search warrant?

A Yes.

Q When you first saw him, was he sitting on a bench seat with his client?

A I think that's what he was doing.

Q And did he stand up when you approached to talk to you?

A Right. I think we approached each other.

Q Did he have with him at that time a briefcase?

A Yes.

Q And did he also have an accordion file with him?

A I don't recall an accordion file.

Q You don't.

Do you recall him telling you that he had on that occasion attempted to get Judge Bascue to continue the Grand Jury appearance, that he attempted to do that on Friday?

A I don't know if that's when I heard about [p. 62] it. But I did hear about it at some point. I can't say whether it was that morning.

Q You can't say whether it was that morning or before that morning?

A Correct.

Q Do you recall his showing you the documents that he had attempted to file? And I'm now talking on the morning of the 21st.

A No. No. I don't recall him showing me documents.

Q You don't?

A No.

Q Do you recall him showing you a number of documents inside an accordion file?

Do you have a recollection of that event?

A No. I don't.

Q Did he make a request of you again to continue the Grand Jury appearance?

A I don't recall if he specifically made the request again.

Q He might have. But you don't recall?

A Perhaps, yes.

Q Might he have shown you these documents that he filed on Friday, tried to file on Friday, but you don't have a recollection today?

[p. 63] A I suppose it's possible. But I just have no recollection of that.

Q How long was the conversation with Mr. Gabbert when you first met him on that morning?

A It was just for a couple minutes.

Q Did you then proceed with him to your office?

A Yeah - no. I'm not sure that we walked together, or I said, "I'll meet you up there."

Q And did you eventually meet him up in your office?

A Yes.

Q And was he with Traci Baker when he came to your office?

A Yes.

Q And were you still with Ms. Najera?

A Yes.

Q Had you had contact either on the phone or in person with Detective Zoeller before you met with Mr. Gabbert in your office that morning?

A No. I don't remember when Zoeller arrived.

Q Is it fair to say that you had not asked Zoeller to be there on Monday morning before you got there?

A Whether I requested him to be there before

* * *

[p. 66] the only immunity authorized by statute in California was transactional immunity?

A Yes.

Q Did you discuss, not offer, but just discuss the grant of use immunity with Mr. Gabbert in your office that morning?

A No.

Q Tell us if you remember what the conversation was with respect to immunity?

A I once again proposed to him in front of his client that we might be able to resolve this matter so that she could testify and she would receive immunity from criminal prosecution. And I reiterated our procedure, which is that the person receiving the immunity must first provide a statement.

And it is use immunity in the sense that that statement would not be used against them. But that statement would not be utilized in Court. That would only be for the purpose of determining whether or not we should give them a full grant of immunity.

So Mr. Gabbert appeared to not be very informed in this area. And I was somewhat taken aback because he seemed to not really understand what I was proposing or the need to resolve it expeditiously.

And he said, "Well, I would need more time [p. 67] to think about this." I seem to recall saying - inquiring why he would need more time to think about it. It's pretty straightforward.

"Let's get a statement from her right now. I can get the approval immediately, and she could be testifying under full grant of immunity this morning if that's what it's going to take."

Q Were you talking about a written proffer from him or his client?

A No. It wouldn't have to be written. It could be just verbally. We would could just sit down with her and interview her with the understanding that the statement would not be used against her.

Q So that's what you told Gabbert?

A Right.

Q Was there a discussion about whether or not, even though it wouldn't be used against her, it could be used for leads in your investigation?

Do you recall that having been discussed?

A No. I don't think we got into that aspect of it. I'm sure we didn't get into that aspect of it.

Q Was there any talk about whether it could be used to impeach her if you eventually decided not to give her immunity and prosecuted her and she testified?

A I don't think we got into - again, these [p. 68] are concerns that perhaps a defense attorney or Ms. Abramson might have or one of the other defense attorneys on the case. So they're not really my concerns.

Q Just assume they are concerns a defense attorney might have.

Do you recall Mr. Gabbert mentioning these concerns about the use of the statement that she gave?

A No. I remember him very uninformed and simply saying, "Well, I need time to think about this." And I was surprised how unprepared I think he was to discuss these matters.

And it became very clear to me at that point that with him not having enough knowledge in this area, he was not going to be prepared to do anything today. So we were just spinning our wheels. And she was going to have to take the 5th. He made that very much clear that he was going to need more time.

And he spoke about some sort of a letter outlining what it was that I was proposing. And I said, you know, "If that will help, we could do that. But now is the time. Today's the day. I would just like to do it now."

And he said, "I really can't do anything today. I would like to look at the immunity statute. I would like to research this area." And I was surprised [p. 69] that he didn't research it already or have more knowledge of this coming into the meeting.

But in any event, I knew that given his lack of knowledge and whether he was going to be conferring with other defense lawyers who are involved in my case, I felt that for whatever reason he was not going to be prepared to do anything today.

So I said, "All right. Let's just go downstairs, and we'll ask our questions. And if she's going to take the 5th, then she takes the 5th."

Q During the conversation, did you and he discuss the possibility of your putting in a letter, the procedure that you were suggesting?

A Yeah, yeah. That was one of the things that we discussed. He wanted to see it in writing.

Q Did you tell him that you would do that?

A Yeah. I told him, "If necessary, that's something that we can do." But again I was trying to persuade him that this is something that we can accomplish today.

Q Did he say to you that he would go down to the Grand Jury if you brought the letter down, and it was

satisfactory that he would follow the procedure that you recommended?

A No. No. He never said that.

[p. 70] Q He didn't say that?

A No.

Q How long did he remain in your office on that occasion?

A Just five minutes.

Q And the participants were you, he, his client and Carol Najera?

A I believe Carol was there. Whether she was in or out, I'm not clear about.

Q Zoeller was not there?

A I don't think Zoeller was there.

Q And when he left the office on that occasion, did you understand that he was going back down to 13?

A Yes.

Q And it was your state of mind that you were going to prepare a letter to bring down to him?

A That - no. That was still a possibility. But I also knew by this point that we would be getting a search warrant. And once we had the warrant, there might be a change of strategy on his part.

If we got the warrant and we got the documents that we requested, it might not even be necessary to outline

the immunity and so forth as we previously had contemplated. So writing the letter wasn't [p. 71] a priority at that point.

Q Did you read the Complaint in this case that was filed that started this lawsuit?

A No.

Q You haven't read it?

A No.

Q Mr. Gabbert alleges that when he left your office on that occasion, that you indicated that you were going to have that letter prepared and brought down to the Grand Jury room.

A Uh-huh.

Q Would you disagree with that statement?

MR. BRAZILE: That you just made?

MR. LIGHTFOOT: Yeah.

Q And what I'm doing is I'm characterizing his deposition testimony that he believed when he left your office that you were going to have a letter typed up and brought down for him to review.

Would you disagree with that?

MR. BRAZILE: Well, I'm going to lodge an objection. It calls for speculation and conjecture on the part of this witness.

He's testified as to what his intentions were. As to what Gabbert's interpretation of that was, there's no way

for this witness to know. You're asking [p. 72] for him to speculate about Gabbert's interpretation of the conversation.

MR. LIGHTFOOT: This is a deposition. So that's all I'm asking.

Q I'm not asking for your personal knowledge. But when you left the room, was it your understanding that he believed that you were going to come down with a letter when you went to the Grand Jury?

MR. BRAZILE: I'm not instructing the witness not to answer the question.

But if you know what he was thinking, you can answer. But if you don't know what he was thinking, I don't want you to guess or speculate what's in his mind.

THE WITNESS: All right. I can't speculate as to what was in his mind. But I can tell you that the letter was still something that we were discussing as a possibility that would facilitate discussions in this area.

But it was very clear to me that he was not going to take this letter and then right then and there on the spot tell his client, "Okay. Go ahead and testify." I mean, he made it very clear to me that he was going to need time to process this, to do his research. And I suspect to go to talk to defense attorneys on the case.

So I simply - as I said, the letter was [p. 73] not a priority for me at that point.

Q Did you say anything to your secretary before Mr. Gabbert left your office with respect to her typing up a letter as we've just discussed?

A I don't recall following through with the letter.

Q I'm going to jump forward, and then I'm going to come back.

Eventually, you went down to the Grand Jury area and met with Mr. Gabbert again, did you not?

A Right.

Q And how many minutes was that approximately after he left your office?

A I really couldn't say how much time it was.

Q Do you recall when you saw him again down - I'm not talking about the Grand Jury room but the Grand Jury section - when you met him that time, his asking you if the letter had been typed?

A No. I don't recall him asking me at that moment.

Q You have no memory of that?

A No.

Q He could have, but you don't remember?

A It's possible. I just don't know how we left the conversation in terms of when this letter would [p. 74] be drawn up. Because as I said, it was clear from him that nothing was going to happen today, no agreement was going to be reached today. So it just wasn't a priority for me.

Q When did you decide to apply for a search warrant?

A After he indicated that he had the documents.

Q This was down in the Grand Jury area?

A Correct.

Q Do you recall the words he used that put you in that state of mind?

A I don't recall the exact words. But I do recall, as I indicated in the search warrant, that we had a conversation concerning the specific documents that we requested, and he said - he indicated to me, "Yes. I have it here." He referred to his briefcase.

Q And he did gesture in a direction -

A I believe he lifted up his briefcase kind of and, you know, saying "I have it here," something to that effect.

Q Do you recall that you asked him whether he had the letters himself?

A Yeah. I was the one who spoke.

Q You asked, not using those exact words [p. 75] necessarily, but you asked that question whether he possessed the documents which were the subject of this Subpoena?

A Correct.

Q All right.

And Ms. Najera was there, was she?

A Right.

Q Right.

And did you decide at that moment in time that you were going to get a search warrant?

A Yes.

Q And what's the first thing you did with respect to obtaining a search warrant after that moment in time?

A I know I made contact with both the secretary Patty Fairbanks and Les Zoeller, who had arrived by this point in time, and informed them that they would add to the existing search warrant, which I know now was on the computer in the D.A.'s office.

Q How did you know that?

A I remember that they - on Friday I remember Patty working on it on Friday. I was present when she was working on it.

Q So does that refresh your recollection as to where Zoeller signed the affidavit?

[p. 76] A Right. He must have signed it - yeah. He signed in the Criminal Courts Building.

Q He did?

A Right.

Q And that affidavit that you were looking at before the March 18th affidavit, that was typed up by Patty Fairbanks?

A Right. I don't know if Les Zoeller brought something to her in handwriting or typed up, but the document was eventually done by Patty.

Q Did your office have the capability of - , I don't know what the right terminology is - using information in computers at Beverly Hills Police Department?

A No. Not that way. But Les Zoeller might have brought it on the disk, or he might have brought a handwritten affidavit. But eventually I know Patty put it into our computer.

Q Do you remember now reading the affidavit before it went down to Judge Pounders on the 18th?

A I'm sure I did.

Q And the search warrant itself?

A I'm sure I did.

Q When you left Mr. Gabbert for the first - when you had your first meeting with him that morning - [p. 77] you've indicated in the Grand Jury section -

A Uh-huh.

Q - sometime in the 9:00 o'clock area, would you say?

A Right; in the hallway.

Q In the hallway; right.

Is it fair to say that you then went up to your office not in the company of Gabbert?

A We may have went up on separate elevators. I'm not sure.

Q Did you take steps to have a warrant issued between the time that you left Gabbert on the 13th floor and you're sitting down and beginning your conversation with him in your office that morning?

A Yeah. I think I caused the warrant to be amended to add the new information. But whether I did that before

speaking to Mr. Gabbert or after speaking with Mr. Gabbert in my office, I don't know.

Q Right.

A But it was after I spoke to him in the hallway.

Q Now, when Mr. Gabbert left your office to go back down to 13, had you met with Mr. Zoeller yet?

A I'm sure by that time I had.

Q But he was not in the meeting that you had

* * *

[p. 86] selection of Elliot Oppenheim off the list yourself?

A Right. I'm sure I didn't.

Q You have no recollection who did that?

A No.

Q Was Mr. Zoeller now up in your offices, your office itself, and the secretary's area at this time as you're preparing the search warrant?

A Was he where?

Q Was he in your office or in the general area of your office?

A I don't know where he was. He was working with Patty, I'm sure, in putting together the warrant. So I'm sure he was in the area.

Q Did you draft that portion of the probable cause affidavit which was added to the existing affidavit?

A Could I see that.

Q Sure.

I don't want to interrupt you, but I'm talking about that portion of the affidavit that begins on page 7, line 15 and proceeds to the end of the affidavit.

A Right. Yeah.

I can't recall who actually used this language, whether this was that paragraph which begins on line 15 or - something that Les Zoeller drafted or I drafted, I don't know.

[p. 87] But then I do know that I provided the information, that which appears on line 23. And Mr. Gabbert informed me that he has the document referred to the [sic] in the warrant in his possession and on his person.

Q Is it fair to say, Mr. Conn, that the whole of that paragraph, proceeding down through line 7 on page 8, would have been knowledge in your particular possession and not Mr. Zoeller's?

MR. BRAZILE: Objection. It calls for speculation and conjecture on the part of this witness. Lack of foundation, and it assumes facts not in evidence.

Everything all the way down to line 8 on the following page?

Why don't you read that?

THE WITNESS: Right.

BY MR. LIGHTFOOT:

Q You're not saying "right" to the question? or are you saying "right" to the question?

A No. What I'm saying - I - I can't say how much knowledge of all these facts Les Zoeller had. But I can tell you that, as I said I was aware - let's take that line by line -

Q Just for the reporter's sake, we're starting on page 7, line 23.

A Right.

[p. 88] Q The first sentence was knowledge that you had; is that not correct?

A That's correct. And I provided that to Les Zoeller so that he could complete his warrant.

Q And the second sentence, that's knowledge that you had, personal knowledge that you had that Mr. Zoeller didn't have?

A Correct.

Q And the next one, that's information you came into possession of?

A Correct. And as I said earlier, that's something that I learned at some point. And exactly when I learned that, I'm not sure.

Q And you learned the next sentence that Judge Bascue denied his motion without prejudice?

A Correct.

Q By the time this information was provided to Ms. Fairbanks, had you seen the order of Judge Bascue denying the motion without prejudice?

A As I said, I don't have any recollection of seeing those documents.

Q Have you seen that order?

A I don't - no. I don't have any recollection of seeing it.

Q The next sentence, Mr. Gabbert still

* * *

[p. 110] A Oh, yes.

Q And it was your understanding that he was going to execute the warrant?

A Correct.

Q Now, you made a decision before you sat down with Mr. Gabbert in your office to have the warrant issued, did you?

MR. BRAZILE: Are we talking about the warrant for his person or for his office?

MR. LIGHTFOOT: No. Until I say otherwise, I'm talking about the warrant that was issued at 10:03 for his person.

THE WITNESS: Could you state that again.

BY MR. LIGHTFOOT:

Q You made that decision between the time that you left Mr. Gabbert when you saw him for the first time in the Grand Jury and then sitting down with him in your office on the 18th floor?

A Yeah. I believe it was at that point in time that I determined that we should seek a warrant for his person.

Q And at that time you decided to seek a warrant for the person of Traci Baker?

A If I can refer to the warrant.

Q Sure.

[p. 111] A Right. At that point, we knew that they had the documents in their presence - on their possession - in their possession, that is, that Gabbert had it at the moment that I had spoken to him.

And there was always a possibility that he may have handed the documents back to her. So we determined at that point to seek a search warrant for the persons of both of them.

Q So you did it in that respect because at the time you weren't sure who would be in possession of the documents; is that correct?

A Our information was that Gabbert had it in his briefcase at that point in time. But there was always the possibility that by the time the search warrant was obtained, he might have transferred the documents back to her.

Q Because that was the command of the search warrant that she bring the documents with her; isn't that right?

A Correct. Of the Subpoena Duces Tecum.

Q Right.

The command was that when she went into the Grand Jury room that she have the documents?

A That was the command, yes.

And you caused this warrant to be executed [p. 112] shortly before Traci Baker appeared before the Grand Jury?

A Correct. Well, let me see now.

Right. It was before she appeared before the Grand Jury.

Q That the search warrant was executed on Mr. Gabbert?

A Correct.

Q In fact, the search warrant was not executed on Traci Baker, was it?

A I think - no. I don't think she was searched. I don't think she was searched.

Q In fact, the warrant itself indicates through interlineation that the execution of Mr. Gabbert is to be effected through the special master; isn't that correct?

A Correct.

Q And that interlineation is in the hand of Judge Pounders, is it not? You see it on the front page of the warrant?

A Correct.

Q And there is no such interlineation with respect to paragraph 2, dealing with the search of Ms. Baker; isn't that correct?

A Correct.

Q And, in fact, it was your understanding [p. 113] that a special master was not needed to search the person of Traci Baker that morning; isn't that correct?

A Correct.

Q Did you see the execution of the warrant on Mr. Gabbert?

A Gabbert was taken into a room with Oppenheim. And that's where the search, the initial review of the material, took place.

Q I was talking specifically that he was given a copy of the warrant, was he not - Mr. Gabbert?

A I'm not sure if I - I'm not sure if I was present at that moment or if I recall seeing that specifically.

Q Might you have been in the Grand Jury room itself with the Grand Jury at the time that Mr. Gabbert was given a copy of the warrant?

A No. I think I was present when he was - was present when he was first told that there would be a search.

Q Who told him?

A I'm not sure if it was myself or Zoeller. We might have both spoken to him.

Q Was Mr. Oppenheim there at the time?

A Yes. He was at the time.

Q Do you recall whether Mr. Oppenheim was [p. 114] introduced by you or Mr. Zoeller to Mr. Gabbert?

A I don't know who did the introductions.

Q Do you have a recollection that somebody introduced a special master to Mr. Gabbert?

A No. I don't know. I can't recall who, if anyone, did that.

Q Mr. Oppenheim, then, left your view to go off with Mr. Gabbert, did he?

A Correct.

Q He went into a room?

A Yes.

Q And then closed the door?

A Correct.

Q And you went into the Grand Jury room?

A I don't know that they closed the door. I don't remember watching it to that extent.

Q You don't remember whether he closed the door?

A No.

Q But he went out of your sight?

A Right. I believe they went out of my sight at that point.

Q Did you then proceed into the Grand Jury room itself?

A Yes. I believe at that point I went to the [p. 115] Grand Jury room.

Q You had not read the provisions of 1524 that morning, as I recall your testimony?

A Correct.

Q Were you aware of the requirements and procedures that Mr. Oppenheim had to follow as a special master?

A What specifically are you referring to?

Q Well, are you aware today that there are certain requirements that are placed on a master at the time he begins to execute the warrant and during the execution of the warrant?

A I haven't looked at the provisions lately.

Q Were you aware of those provisions on the morning of March the 21st?

MR. BRAZILE: The question is vague and ambiguous as to "aware of those provisions."

Do you mean that they existed, the specifics, in the entire section?

MR. LIGHTFOOT: No. In his mind on the morning of March 21, 1995.

Q Were you, Mr. Conn, aware that there were particular requirements that were placed on a special master by Section 1524 before and during the execution of a warrant under that section?

* * *

[p. 122] had in your office with Mr. Gabbert that morning discussing the subject of whether he would surrender his client if the Grand Jury indicted her?

A I think he did mention that to me at one point. I don't recall when he mentioned that.

Q Do you recall that it was he, rather than you, who brought the subject up?

A I'm sure it was. Yeah.

Q You're positive you didn't bring the subject up?

A Of her surrender?

Q Yeah.

A I wouldn't say I'm positive. I seem to recall that being his concern.

Q When you saw Mr. Oppenheim - Mr. Oppenheim was an elderly man, was he?

A Yes.

Q When you saw him go off with Mr. Gabbert - you've indicated you went into the Grand Jury room?

A Yes.

Q Did Ms. Najera go with you?

A Yes.

Q And did you call Mr. Zoeller in as a witness?

A Yes.

[p. 123] Q And then he concluded?

A Yes.

Q And then was Ms. Najera's responsibility to examine Ms. Baker?

A Yes.

Q And did she go out and call Ms. Baker in as a witness?

A No. I don't think she went out. They have someone in the Grand Jury that does that.

Q And then Ms. Baker came in?

A Yes.

Q And she was questioned by Ms. Najera?

A Yes.

Q And do you recall that the first substantive question that Ms. Najera asked her was if she knew Lyle Menendez?

A Yes.

Q Do you recall Ms. Baker saying that her lawyer was being searched and she needed to go out to talk to him?

A Right.

Q And was she allowed to go out?

A Yes.

Q And how long was she gone?

A It's my recollection - I don't know how

* * *

[p. 126] Q You don't?

No.

Q You say when you came out of the Grand Jury room, at some point then or shortly thereafter you became aware of Mr. Oppenheim and Mr. Gabbert?

A Right.

Q Did Mr. Oppenheim speak to you at that time?

A I don't know that he spoke to me. He indicated that -

Detective Zoeller was there. I was there. Ms. Najera was there. And he indicated in our presence that he had searched the briefcase and that he saw nothing of a privileged matter.

Q All right.

Did he indicate to you whether Mr. Gabbert had claimed to him that there were privileged documents in his possession at that time?

A No. I don't recall that.

Q Do you have a recollection that he, Oppenheim, did not relate that to you, or do you just not have a recollection as to whether he did or did not?

A I don't recall him saying anything either way.

Q How long was the conversation with [p. 127] Mr. Oppenheim?

You, Mr. Zoeller and Ms. Najera were all participants in that conversation?

A What do you mean "participants"? We were present.

Q Well, you were all standing there -

A Right.

Q - with Mr. Oppenheim?

A Right.

Q Where was it with relation to the Grand Jury room itself that you had just come out of?

A I believe that this was in the waiting room where the table and chairs are.

Q Was it outside the presence of other individuals?

A What other individuals are you referring to?

Q Paul Gabbert?

A No. Gabbert was there.

Q Did he hear the conversation you had with Mr. Oppenheim?

A What conversation?

Q The conversation in which Mr. Oppenheim, as you've just indicated, said that he didn't find any privileged information or materials.

[p. 128] A Right.

Q Was Mr. Gabbert within earshot of that conversation?

A Yes.

Q Was he standing with the group -

A Yes.

Q - To whom Mr. Oppenheim was speaking?

A Yes.

Q Did Mr. Gabbert say anything during this period when Mr. Oppenheim was advising you that he found nothing privileged in the document?

A He was saying something like, "I have nothing here."

Q Well, in fact, he was angry, wasn't he?

A Yes. He was.

Q He protested that he did not want his materials to be searched, didn't he?

A I remember him saying he had nothing here.

Q Do you recall that he protested that he didn't want anybody to search his documents?

A I don't specifically remember him saying that. He knew we had a warrant.

And he simply said, "I don't have anything here. I don't have it."

Q Was he there when Mr. Oppenheim said to the [p. 129] three of you that there was nothing privileged within the document?

A Right.

Q And he protested by claiming -

Mr. Gabbert did - that there were privileged documents, didn't he?

A No, no.

Q He didn't?

A I don't recall him claiming any privileged documents.

Q Did Mr. Oppenheim hand anything to you at that time that he had seized from Mr. Gabbert?

A No.

Q Did you see anything in his hands?

A No.

Q How long did this meeting with Mr. Oppenheim take?

A It was not a meeting. Oppenheim simply - someone put the question to him - "Did you find anything of a privileged matter?"

And what he said, "There's nothing of a privileged matter." And it was a remark that took only a moment.

Q Did you understand that that was his duty as the special master - his duty was to search through [p. 130] the documents to see if there was anything privileged in there?

A Right.

Q And if he determined that there was nothing privileged, then documents could be searched?

A Correct.

Q By whom?

A By the investigating officer.

Q Investigating officer?

A Right.

Q And what was your authority for that belief?

MR. BRAZILE: Other than the Penal Code section?

BY MR. LIGHTFOOT:

Q Is that the basis for your belief?

A And the search warrant which instructs - commands the investigating officer to search the body of the person of Paul Gabbert.

Q Doesn't it say "through Special Master Oppenheim"?

A Yes. I think what he meant there "with the assistance of."

Q "With the assistance of a special master"?

A That's correct.

Q So it was your understanding that whoever conducted the search, it had to be conducted in compliance [p. 131] with the Penal Code; isn't that right?

A Correct.

Q And particularly with the provisions of Section 1524; isn't that correct?

A Correct.

Q I gather this was just a momentary point in time where somebody put the question to Mr. Oppenheim and

he responded that there was nothing privileged; is that right?

A Exactly.

Q And was it shortly after that that Mr. Zoeller conducted the search?

A Correct.

Q And did Mr. Zoeller conduct that search at the same location where this meeting with Mr. Oppenheim had just taken place?

A Correct. Yeah.

Q And at the time that Mr. Oppenheim was speaking, were the possessions of Mr. Gabbert in Mr. Gabbert's - was he physically holding them - Mr. Gabbert?

A Gabbert was holding his briefcase.

Q His briefcase?

A Yeah.

Q Do you recall him holding anything else?

[p. 132] A No.

Q Do you have any better recollection now that he might have been holding an accordion file with documents in it?

A No.

Q Do you know what I mean by an "accordion file"?

A Yes.

Q Where you can actually see – a Redwell – where you can see the documents?

A Yes.

Q Do you understand what I'm talking about?

A Yes.

Q Do you recall that, in fact, Mr. Gabbert showed documents in a Redwell binder, an accordion file, to Mr. Zoeller?

A I remember he opened up the briefcase, and he said, "Look. I don't have it. I don't have it. Take a look."

He was holding it open for the investigating officer to take a look. And there may have been an accordion file in the briefcase. I wasn't really paying attention to what was in there.

And then Zoeller went over and flipped through it and said, "It's not there."

[p. 133] Q So Mr. Zoeller didn't seize anything?

A Right.

Q And as far as you know, Mr. Oppenheim didn't seize anything?

A Correct. I don't remember anything being seized.

Q For the sake of refreshing your recollection or changing your recollection, I will tell you that yesterday Ms. Najera testified that she had a recollection of either Mr. Zoeller or Mr. Oppenheim taking something from Gabbert.

MR. BRAZILE: Well, is that – I don't recall that.

MR. LIGHTFOOT: That's my recollection.

MR. BRAZILE: That's your recollection of her testimony. That's one thing. But I don't recall that being her testimony.

MR. LIGHTFOOT: That's what I recall. And she couldn't recall which it was.

Q Does that refresh your recollection that one of these two gentlemen had seized something from Mr. Gabbert?

MR. BRAZILE: Do you understand that that's his recollection of her testimony? And I don't recall it that way. And without a transcript –

So I don't want you to commit to something [p. 134] he believes to be true.

MR. MACLATCHIE: For the record, I don't recall it that way either.

MR. LIGHTFOOT: For the record, you both have bad recollections.

THE WITNESS: I did not see either one of them take documents from them.

BY MR. LIGHTFOOT:

Q In fact, have you seen the Return to this particular search warrant?

A I'm sure I saw it some time ago.

Q And nothing was seized according to the Return; isn't that right?

A Do you have the Return here?

(Whereupon a discussion was held off the record.)

MR. BRAZILE: Can I take a look at it when you're done.

MR. LIGHTFOOT: Sure.

For the record, this is attached as part of Exhibit C to the Complaint in this matter, the Return to the March 18th morning search of Mr. Gabbert.

Q Have you seen that before, Mr. Conn?

A No. I'm not even sure that I saw that before.

[p. 135] Q But that Return indicates that no property was seized.

Is that still your best recollection that no property was seized?

A My recollection is that I did not see anything taken from Mr. Gabbert.

Q Now, you recall that at some point later in the morning - by the way, do you know Mr. Richard Hirsch?

A Yes.

Q You met Mr. Richard Hirsch?

A Yes.

Q And when you met him, you understood that he was there as Mr. Gabbert's attorney; is that correct?

A Yes. I guess you can say "as his attorney."

Q At the point where you came out of the Grand Jury and listened to Mr. Oppenheim and after listening to

Mr. Oppenheim, did you direct Mr. Zoeller to search the briefcase of Mr. Gabbert?

A I remember I was involved in that conversation. I didn't direct him. I indicated - I believe I indicated to Mr. Gabbert at that point that the investigating officer would take a look at the briefcase now.

Q And you understood that to be a search?

[p. 136] A I wasn't directing the investigating officer. The investigating officer was commanded by the search warrant to conduct a search.

Q Right.

A And I advised Mr. Gabbert at that point that now the investigating officer would carry out the command of the issuing magistrate.

Q Did you ask Mr. Gabbert for his permission?

A No. Because he we [sic] had a search warrant.

Q Did you hear Mr. Zoeller ask him for his permission?

A No.

Q Did you hear anybody ask Mr. Gabbert for his permission before Mr. Zoeller conducted the search?

A Mr. Gabbert was holding onto his briefcase, and he was saying, "Here. Take a look. Take a look. It's not in here."

Q But you heard nobody ask Mr. Gabbert for his permission to search -

A Correct.

Q - isn't that correct?

Are you aware that Subsection (e), or were you aware on that morning, March 21, 1994, that Subsection (e) of 1524 provides - I'll just read this -

"Any search conducted pursuant

* * *

[p. 151] State of California
County of Los Angeles SS:

I, Joanne Hokyo, Certified Shorthand Reporter No. 9169, in and for the State of California, do hereby certify:

That prior to being examined, DAVID CONN, the witness named in the foregoing deposition, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

That said deposition was taken before me pursuant to Notice, at the time and place therein set forth, and was taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

I further certify that I am neither counsel for, nor related to, any party to said action, nor in anywise interested in the outcome thereof.

In witness whereof, I have hereunto subscribed my name this 17th day of August, 1995.

/s/ Joanne Hokyo
Certified Shorthand Reporter
For the State of California

EXHIBIT 4

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

PAUL L. GABBERT,)	
Plaintiff,)	
vs.	)	No.
	)	CV 94 4227 RSWL(Ex)
DAVID CONN, CAROL)	
NAJERA, ELLIOT)	
OPPENHEIM, LESLIE)	
ZOELLER AND DOES 1)	
THROUGH X,)	
Defendants.)	

DEPOSITION OF CAROL NAJERA

Los Angeles, California

August 3, 1995

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

PAUL L. GABBERT,)	
Plaintiff,)	
vs.	)	No.
	)	CV 94 4227 RSWL (Ex)
DAVID CONN, CAROL)	
NAJERA, ELLIOT)	
OPPENHEIM, LESLIE)	
ZOELLER and DOES 1)	
through X,)	
Defendants.)	

DEPOSITION OF CAROL NAJERA,

taken on behalf of the Plaintiff, at 655 South Hope Street, Thirteenth Floor, Los Angeles, California 90017, commencing at 10:32 a.m., Thursday, August 3, 1995, pursuant to Notice, before Barbara Walsh, CSR #4134, RPR.

APPEARANCES:

FOR THE PLAINTIFF:

TALCOTT, LIGHTFOOT, VANDEVELDE
WOEHRLE & SADOWSKY
BY: MELISSA N. WIDDIFIELD
MICHAEL J. LIGHTFOOT
CARLA M. WOEHRLE (not present)
655 South Hope Street, Thirteenth Floor
Los Angeles, California 90017

FOR DEFENDANTS DAVID CONN and CAROL NAJERA:

COUNTY OF LOS ANGELES
DE WITT W. CLINTON, County Counsel
BY: KEVIN C. BRAZILE
Principal Deputy County Counsel
650 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012

FOR DEFENDANTS ELLIOT OPPENHEIM and LESLIE ZOELLER:

FRANSCCELL, STRICKLAND, ROBERTS &
LAWRENCE
BY: SCOTT D. MacLATCHIE
225 South Lake Avenue
Penthouse
Pasadena, California 91101-3005

* * *

[p. 15] privileged as to the case, Grand Jury secrecy as well as government information and instruct her not to answer any questions about that prior case.

BY MS. WIDDIFIELD:

Q Before you examined witnesses before the Grand Jury on this occasion, were you given any training as to how to examine witnesses in front of a Grand Jury?

A No.

Q Were you given any training at all as to Grand Jury procedure?

A I was not given a class on Grand Jury procedure.

Q Were you given any guidance or instruction by any superiors in any way?

A Yes.

Q What was that instruction?

MR. BRAZILE: Don't refer to any particular case. Just in general the guidelines or rules that we have told you about.

THE WITNESS: I think there was a list of rules that they give to attorneys before they go into Grand Jury.

BY MS. WIDDIFIELD:

Q Do you remember what those rules said?

A No.

Q It's your understanding that when a witness testifies before the Grand Jury that their counsel can't be in the room with them; is that correct?

[p. 16] A Yes.

Q But that a witness may in fact ask to confer with counsel; is that correct?

A Yes.

Q Then they leave the Grand Jury room to go outside to confer with their counsel; is that correct?

A Yes.

Q In your 10-year career with the District Attorney's office, have you on occasion caused search warrants to be obtained in the course of an investigation?

A I'm not sure what you mean by "caused search warrants to be obtained."

Q When you're working on a case, I take it that you work closely with law enforcement; is that correct?

A We work with law enforcement - I don't know if you call it closely - in the prosecution of the case. Talking about the prosecution investigation.

Q Let's talk about the investigation of the case. Have there been occasions when you have worked on the investigation of a case or matters prior to the complaint being filed or an indictment being returned?

A No.

Q So you generally are not assigned to a matter until a complaint has been filed or until an indictment has been returned?

* * *

[p. 26] Q Sure. As you sit here, do you have any understanding as to what those provisions are?

A I couldn't rattle them off to you. I could look it up.

Q I believe you stated you were assigned to the Menendez matter in January of 1994; is that correct?

A I was assigned to it after the first jury hung. I know they hung around January of '94. I don't remember when I was assigned but -

Q I take it David Conn is also assigned to that case?

A Yes.

Q Were you assigned together, at the same time?

A I don't know.

Q Does one of you function as lead counsel in that case?

A Yes.

Q Who would that be?

A That would be David Conn.

Q After you became assigned to the Menendez matter, did there come a point in time when you became aware that you needed additional information from Traci Baker?

A Yes.

Q When did that come about?

MR. BRAZILE: Just - well, I'm going to lodge
an

* * *

[p. 70] Q When you got back downstairs, were Mr. Conn, Mr. Gabbert and Ms. Baker back in the Grand Jury area?

A They might have all gone down together. I don't remember.

Q When you were at Mr. Conn's office, did you have any conversation with Mr. Conn alone without Mr. Gabbert and Ms. Baker?

A I may have.

Q Do you recall what that conversation was about?

MR. BRAZILE: With Mr. Conn?

MS. WIDDIFIELD: Yes.

MR. BRAZILE: Objection. That's privileged. Attorney work product as well as official government information.

BY MS. WIDDIFIELD:

Q Do you know if Detective Zoeller was in the District Attorney's office at that time?

A I believe he was.

Q Was there a decision made at some point that morning to obtain a search warrant for the person of Paul Gabbert and Traci Baker?

A For the what?

Q For the person of Paul Gabbert and Traci Baker.

A I don't believe for Traci Baker.

Q For Paul Gabbert?

A Yes.

[p. 71] Q When was that decision made?

A Sometime that morning.

Q Who made that decision?

A It was - again, in my opinion it was a joint decision.

Q Between you, Mr. Conn and Detective Zoeller?

A I believe it was Mr. Conn.

Q Was that decision made before or after the conversation with Mr. Gabbert and Ms. Baker in the hallway?

A After.

Q On what basis did you make the decision to obtain a search warrant of Mr. Gabbert?

MR. BRAZILE: Objection. Attorney work product as well as official government information. Privileged. The witness is instructed not to answer. I believe the search warrant speaks for itself. (Mr. MacLatchie exits deposition room.)

BY MS. WIDDIFIELD:

Q Did Mr. Gabbert and Ms. Baker leave Mr. Conn's office by themselves, do you know?

A I don't.

Q Do you know if they left with Mr. Conn?

A I don't remember.

Q Was a decision made to obtain a search warrant before they left Mr. Conn's office?

* * *

[p. 85] A Yes.

Q And you understand that she was represented by Paul Gabbert on that Monday morning, didn't you?

A I knew Monday morning when she was there that she was represented by Paul Gabbert, yes.

Q And you understood he was there because he was representing her before the Grand Jury?

MR. MACLATCHIE: Objection. Vague.

MR. BRAZILE: Wait. Objection. The question is vague and ambiguous plus inaccurate because you cannot represent somebody at the Grand Jury.

BY MS. WIDDIFIELD:

Q Mr. Gabbert's presence at the Criminal Courts Building on Monday, March 21 was in his capacity as counsel for Ms. Baker while she was testifying before the Grand Jury; isn't that correct?

A He identified himself as her attorney.

Q You understood him to be there because his client was testifying before the Grand Jury; isn't that correct?

MR. BRAZILE: Objection. Lack of foundation. Do you want to assume that or why don't you ask her if he told her that?

MS. WIDDIFIELD: Let's see if the witness can answer.

THE WITNESS: He stated he was there and he was her attorney.

MR. BRAZILE: Did he say that?

[p. 86] BY MS. WIDDIFIELD:

Q You tell us -

A Not that I remember.

Q You had an understanding why he was there?

MR. BRAZILE: Objection as to what her understanding was. If she can answer the question -

If you didn't have an understanding, tell her. If you did, tell her.

THE WITNESS: I understood he was there as her attorney.

BY MS. WIDDIFIELD:

Q Let me put it this way: He wouldn't have been there representing her as his client if his client hadn't been testifying before the Grand Jury; isn't that true?

A Yes.

MS. WIDDIFIELD: Off the record.

(Recess taken.)

MS. WIDDIFIELD: Let's go back on.

Q After the warrant for Mr. Gabbert was obtained, what did you then do?

A Well, sometime after the warrant was obtained we were all back in the Grand Jury room.

Q Did you go there with Mr. Conn?

A I think so.

Q Did you go in with Mr. Oppenheim?

A I don't remember for certain.

[p. 87] Q You don't recall all of you going together?

A I don't actually recall going down there, is the problem.

Q You don't recall getting there? You just got there?

A Yes.

Q Who was there when you got there to the Grand Jury room? Well, we'll describe it as the Grand Jury area.

A As I recall, myself, Mr. Conn, Les Zoeller, Mr. Oppenheim, Paul Gabbert, Traci Baker, the bailiff, I think Kathy is her name, the secretary, Grand Jury advisor. I think that's it.

Q All of these people were there at the same time.

A In the general area of the Grand Jury area.

Q So what time would that have been?

A I couldn't tell you. In the morning.

Q And the advisor, is that Terry White?

A Yes.

Q And the bailiff, was that Timothy Fox?

A Never knew him. I still don't know him.

Q When you got there, then what happens?

A At some point, Detective Zoeller told Mr. Gabbert that he had the search warrant.

Q Had you given Detective Zoeller any instruction what to do with the warrant once he obtained it that morning?

[p. 88] A I personally?

Q Yes.

A I don't recall giving him instructions.

Q Do you recall whether Mr. Conn did?

A No.

Q Detective Zoeller introduced himself to Mr. Gabbert; is that correct?

A I don't know if he did it then or if he'd already done it but he was there with Mr. Gabbert.

Q Where was Ms. Baker at this point?

A She was in the room.

Q In the Grand Jury room?

A Not -

MR. BRAZILE: When you're saying -

MS. WIDDIFIELD: That's what I'm trying to clarify.

Q What do you mean?

A She was in the Grand Jury area.

Q So we're talking about the anteroom. Would that be a fair way to describe it?

A Just call it the lobby.

Q Okay.

A Okay.

Q So if I'm correct, at this point present in the lobby were you, Mr. Conn, Mr. Gabbert, Detective Zoeller, Mr. Oppenheim, Ms. Baker, Mr. White, Kathy, the secretary, and the [p. 89] bailiff.

Kathy Spahn (phonetic)? Is that the secretary you're referring to?

A I don't know what her last name is.

Q Was Patti Jo Fairbanks there?

A She was in and out, yes.

Q What was she doing there?

A I don't really know.

Q Did she normally accompany Mr. Conn if he was going to appear before the Grand Jury?

A Not Mr. Conn but whoever she was working with on any given day.

Q What was she there for? What was her role?

A You'd have to ask her.

Q Okay. After Detective Zoeller introduced himself to Mr. Gabbert, what happened next?

A Well, somehow he acknowledged his presence and he served the search warrant.

Q What happened next?

A Then Mr. Oppenheim and Mr. Gabbert went into what I'll call the anteroom.

Q And where is Ms. Baker at this point?

A She's still floating around in the lobby.

Q Where are you?

A I'm floating around in the lobby as well.

[p. 90] Q Did Mr. Gabbert ask to be taken to a private room?

A I believe so.

Q What did Mr. Oppenheim say to Mr. Gabbert?

A I don't remember.

Q Did Mr. Oppenheim, have with him any envelopes that he might use to seal documents?

A He may have, but I don't remember.

Q Did he have a pad of paper to take notes?

A I think he may have. I don't really have a clear picture of it, but I think he may have.

Q Do you know if he took any notes that morning?

A Not that I was ever made aware of.

Q Did you ever tell Mr. Oppenheim to keep track of what he looked through and whether he took any documents?

A I didn't give him any instructions.

Q Do you know whether Mr. Conn did?

A I don't know.

Q Do you know whether Detective Zoeller did?

A I don't know.

Q Do you know if Mr. Oppenheim ever met with Judge Pounders on that morning?

A I was not aware that that ever happened.

Q Did you see Mr. Oppenheim, and Mr. Gabbert go into what you refer to as an anteroom?

[p. 91] A (Witness nods head.)

Q Was there a door?

A Yes.

Q Was the door open or closed after they went in?

A It was closed.

Q And you and Mr. Conn both watched Mr. Gabbert go into the room?

A I did. I don't know if he did.

Q What did you do then?

A I just waited around in the lobby.

Q At some point did you go in the Grand Jury room?

A Yes.

Q Did Mr. Conn go with you?

A Mr. Conn went first.

Q He went first?

A (Witness nods head.)

Q Did Mr. Conn go into the Grand Jury room while Mr. Gabbert and Mr. Oppenheim were still in the anteroom?

A I don't believe so.

Q Did you see Mr. Gabbert, and Mr. Oppenheim come out before you went into the Grand Jury room?

A Yes.

Q Did you see Mr. Oppenheim, and Mr. Gabbert come out before Mr. Conn went into the Grand Jury room?

A Yes.

[p. 92] Q Was Ms. Baker called to testify before the Grand Jury that morning?

A Yes.

Q When?

A I couldn't say the exact time.

Q You examined her, didn't you?

A Yes.

Q Who actually called her into the room? You did?

A I did.

Q Did you call her into the room - strike that.

Was Ms. Baker called into the Grand Jury room while Mr. Gabbert was with Mr. Oppenheim?

A No.

Q So your testimony is that you waited in the lobby area until Mr. Oppenheim and Mr. Gabbert came out before going into the Grand Jury room?

A I seem to recall I was in the lobby. I remember when they went in and I seem to recall them coming out.

Q But you'd gone into the Grand Jury room before they came out, didn't you?

A I seem to recall them coming out and then I was in the Grand Jury room.

Q How long were you waiting in the lobby before they came out?

A No idea.

[p. 93] Q Was anybody else there waiting with you?

A There were a lot of people milling about. The bailiff, those - Kathy. Those people. Do I have a memory of somebody standing by my side? No.

Q Where was Detective Zoeller?

A I don't remember.

Q Did he testify before the Grand Jury that morning?

A Yes.

Q When did he testify?

A That morning.

Q Where did he go after he served the warrant on Mr. Gabbert?

A He was kind of hanging around the waiting room.

Q Wasn't he before the Grand Jury while Mr. Gabbert was with Mr. Oppenheim?

A No. Because I was in the lobby. I remember that.

Q When Mr. Oppenheim and Mr. Gabbert came out of what you referred to as the anteroom, what happened next?

A They went into the waiting room.

Q Did you have a discussion with Mr. Oppenheim?

A I didn't actually have a discussion, no.

Q Did you talk to him?

A No.

[p. 94] Q Did he say anything to you?

A Not to me.

Q Did he say anything to Mr. Conn?

A Yes.

Q What did he say?

A They had a discussion.

Q Did you overhear the discussion?

A Yes.

Q What was said during this discussion?

A Mr. Oppenheim said that there was nothing privileged in any of the documents that he examined.

Q Did Mr. Conn ask him what the basis for his decision was?

A I believe he may have. But I don't recall the response.

Q What did Mr. Conn then do?

A I don't recall what Mr. Conn did.

Q What did you do?

A I was standing there. And then -

Q Had Mr. Oppenheim seized any document from Mr. Gabbert?

A I think so.

Q Do you recall what that document was?

A I think it was a letter that Traci Baker had. It may have been all of it.

[p. 95] Q What did Mr. Oppenheim do?

A I don't know if he seized it or he had the bailiff seize it.

Q But it was that morning?

A I believe it was that morning or it might have been Mr. Gabbert pulled it out. I don't remember.

Q Where did that letter end up?

A It's in evidence, I believe. On the return.

Q Wasn't it on the return of the search warrant or shouldn't it have been?

A Yes.

Q The document that either Detective Zoeller or Mr. Oppenheim received from Mr. Gabbert, that was in fact the document that both the Grand Jury subpoena and the search warrant sought, wasn't it?

A Not technically.

Q That's what you were looking for, wasn't it? A letter from Lyle Menendez to Traci Baker?

A That's what we were looking for, but that's not what we got.

Q I thought you just stated that's what you got.

MR. BRAZILE: Well, objection -

BY MS. WIDDIFIELD:

Q What else were you looking for if that wasn't it?

A The rest of the letter.

[p. 96] Q Why did you believe Mr. Gabbert would have the letter?

MR. BRAZILE: Objection. Calls for attorney work product. Privileged government information. Instruct her not to answer.

BY MS. WIDDIFIELD:

Q Subsequent to receiving or obtaining that letter, did Ms. Baker testify before the Grand Jury?

MR. BRAZILE: When you say after she got the letter, from Gabbert?

BY MS. WIDDIFIELD:

Q After either Mr. Oppenheim or Detective Zoeller obtained that letter from Mr. Gabbert, did Ms. Baker testify before the Grand Jury?

A We had that letter, a portion of the letter, before Ms. Baker testified before the Grand Jury.

Q If Mr. Gabbert gave you or - strike that.

If everything that Mr. Gabbert had in his possession that was responsive to the search warrant was obtained from him -

A Uh-huh.

Q - okay, why did you still call Traci Baker before the Grand Jury?

MR. BRAZILE: Counsel, same objection. Attorney work product as well as official government information.

[p. 97] For the last time, the witness will be instructed not to answer any questions concerning the thought processes with regards to the Grand Jury testimony or the Menendez case.

MR. MACLATCHIE: Also, lacks foundation.

MS. WIDDIFIELD: With respect to your objection, that's fine, but I obviously need to make a record. I've got to ask the questions.

MR. BRAZILE: I know.

MS. WIDDIFIELD: You can just keep saying "same objection."

MR. BRAZILE: Okay. I'll say that and instruct her not to answer -

MS. WIDDIFIELD: Well, I appreciate that, but I've got to ask the questions.

MR. BRAZILE: Sure.

BY MS. WIDDIFIELD:

Q When the warrant was served on Mr. Gabbert in the lobby of the Grand Jury area, did he object to the service of the warrant?

A He was upset.

Q Did he say something to the effect of "Hey, my client has got to testify before the Grand Jury. Wait a minute"?

A He started - he didn't say that, no.

Q What did he say?

A He just started ranting - I don't really recall [p. 98] what he said.

Q Did he ask that you delay the search until his client was through testifying?

A I don't recall him asking that, no.

Q You knew she was about to be testifying, though, within a minute?

A No.

Q You knew she was going to be testifying that morning, didn't you?

A Yes.

Q Why didn't you wait to execute the warrant until Ms. Baker was through with her testimony?

MR. BRAZILE: Same objection.

BY MS. WIDDIFIELD:

Q Why did you serve the warrant at the time you did?

MR. BRAZILE: Same objection. Same privilege objection.

BY MS. WIDDIFIELD:

Q You could have waited until Mr. Gabbert returned to his office, couldn't you?

MR. BRAZILE: Same privilege.

BY MS. WIDDIFIELD:

Q After Mr. Oppenheim told Mr. Conn that he had not found anything privileged in Mr. Gabbert's possessions, what happened then?

[p. 99] A I believe Detective Zoeller was then going to search for the documents we were looking for.

Q Did you direct Detective Zoeller to conduct that search?

A No. I was just standing there.

Q Did Mr. Conn direct Detective Zoeller to conduct that search?

A I can't recall exactly what Mr. Conn told him.

Q Did Mr. Gabbert give - strike that.

Did Detective Zoeller ask Mr. Gabbert's permission to search his possessions?

A I don't believe so.

Q Had you recently read Penal Code Section 1524 before searching Mr. Gabbert on March 21?

MR. BRAZILE: Recently? You mean that day -

BY MS. WIDDIFIELD:

Q Within the last week, yes.

A I'm sure I had, but I don't remember it right now.

Q Had you taken a look at what is in front of you, what has been marked as Exhibit 1 in the deposition of Detective Zoeller, the Search Warrant Manual? Had you reviewed the manual prior to the search of Mr. Gabbert?

A I may have but I don't recall.

Q I'd like to direct your attention to again [p. 100] Section Roman II-8, Subsection M. You see there are some cases cited there regarding the use of a Special Master? Do you see that?

A (Witness nods head.)

Q Had you read any of those cases prior to the warrant being served on Mr. Gabbert?

A You say within the week?

Q Well, the last six months.

MR. BRAZILE: Well, I'll object as to the relevancy.

MS. WIDDIFIELD: Mr. Brazile, what I'm trying to establish -

MR. BRAZILE: Can I finish? I'll object as to the relevancy. I'll let the witness answer the question. Okay?

BY MS. WIDDIFIELD:

Q Can you answer the question?

A Yes. And I don't remember if I did or not.

Q Had you looked at Penal Code Section 1524 in the last six months?

MR. BRAZILE: Objection. On the grounds of relevance. The witness may answer the question.

THE WITNESS: I'm sure I have but I don't remember actually doing it as I sit here right now.

BY MS. WIDDIFIELD:

Q Had you looked at the provisions in Section 1524 regarding Special Masters?

[p. 101] MR. BRAZILE: In the last six months?

MS. WIDDIFIELD: Yes.

MR. BRAZILE: Same relevancy objection.

THE WITNESS: I'm sure I had but I don't recall, as I sit here, doing it, but -

BY MS. WIDDIFIELD:

Q Are you aware that Section 1524 requires the permission of the person being searched if anybody other than a Special Master is going to search that person?

A Is that what you're telling me now?

Q That is what I'm telling you now.

A Okay.

Q Were you aware of that provision in Section 1524 at the time of search of Mr. Gabbert?

A I don't remember right now, so - I don't know if I was aware or not. But I reviewed this before I came, so -

Q When Detective Zoeller - did you watch Detective Zoeller - strike that.

Did you see Detective Zoeller search Mr. Gabbert's possessions?

A Yes.

Q Where were you standing in relation to Detective Zoeller? How far away were you standing from him when he was searching Mr. Gabbert?

A I was in the same room with them.

[p. 102] About how far away?

A Catercorner.

Q In terms of feet? Two feet?

A I couldn't tell you.

Q Less than six feet?

A No idea.

Q Further away than this table?

A (Witness shakes head.) I would have to go down to the Grand Jury room and take a look again. I can't tell you how big the table was.

Q Could you see the things that Detective Zoeller was looking through?

A Yes. I could see.

Q Mr. Conn could see as well, couldn't he?

A Yes.

Q Did either you or Mr. Conn ask Mr. Gabbert's permission to look at his possessions?

A I didn't, no.

Q Do you know if Mr. Conn did?

A I don't believe he did.

Q What happened after Detective Zoeller, you and Mr. Conn finished looking at Mr. Gabbert's possessions?

A I believe at some point after that I went into the Grand Jury room.

Q Did you do anything else before going into the

* * *

[p. 132] STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I, Barbara Walsh, CSR #4134, certify:

That the foregoing deposition of CAROL NAJERA was taken before me pursuant to Notice at the time and place therein set forth, at which time the witness was put under oath by me;

That the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed;

That the foregoing deposition is a true record of the testimony and all objections made at the time of the examination.

IN WITNESS WHEREOF, I have subscribed my name this 15th day of August, 1995.

/s/ Barbara Walsh

EXHIBIT 5

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,)	
Plaintiff,)	
)	
vs.)	
)	
DAVID CONN, CAROL NAJERA,	)	No. CV 94
ELLIOT OPPENHEIM,	)	4227 RSWL(Ex)
LESLIE ZOELLER)	
AND DOES 1 THROUGH X,)	
Defendants.)	
_____)	

DEPOSITION OF LESLIE ZOELLERLos Angeles, California
August 1, 1995UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,)	
Plaintiff,)	
)	
vs.)	
)	
DAVID CONN, CAROL NAJERA,	)	No. CV 94
ELLIOT OPPENHEIM,	)	4227 RSWL(Ex)
LESLIE ZOELLER)	
AND DOES 1 THROUGH X,)	
Defendants.)	
_____)	

DEPOSITION OF LESLIE ZOELLER,

taken on behalf of the Plaintiff, at 655 South Hope Street, Thirteenth Floor, Los Angeles, California 90017, commencing at 10:21 A.M., Tuesday, August 1, 1995, pursuant to Notice, before Joanne Hokyo, CSR #9169.

APPEARANCES:

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* * *

[p. 61] THE WITNESS: Up to speed on the
Menendez case, yes.

BY MS. WIDDIFIELD:

Q Did you ever speak with Mr. Gabbert in February, 1994?

A Not that I recall, no.

Q So you had no knowledge of Paul Gabbert prior to going to Traci Baker's house to attempt to interview her; is that correct?

A That's correct.

Q And you had never spoken with him prior to?

A That's correct.

Q When you first had the discussion with Mr. Conn as to serving a Subpoena, a Grand Jury Subpoena on Traci Baker, how was it determined that you were going to do that? Were you going to attempt to serve the Subpoena on her counsel or on Ms. Baker directly?

A I wanted to serve Ms. Baker directly.

Q And was that what you initially attempted to do?

A What do you mean by "initially"? Are you assuming that I attempted service of a Grand Jury Subpoena on Traci Baker more than the one time?

Q Why don't you explain to me how you served the Grand Jury Subpoena on Traci Baker.

[p. 62] A It was arranged through Mr. Gabbert and David Conn that Traci Baker would be at Mr. Gabbert's office on the 17th of -

MR. MACLATCHIE: March.

THE WITNESS: - March of 1994.

And a 1:00 appointment was set up. Unfortunately, I couldn't make it until 1:30. And at that point, I served Traci Baker, personally, a Grand Jury Subpoena in Mr. Gabbert's conference room.

BY MS. WIDDIFIELD:

Q Did you have any contact with Mr. Gabbert prior to serving the Subpoena in his office?

A I don't believe so. I might have spoken to him on the phone in reference to Ms. Baker, but I don't recall.

Q Do you recall when that might have been?

MR. GRANBO: Calls for speculation in light of his answer.

THE WITNESS: No.

BY MS. WIDDIFIELD:

Q So I take it you arrived at Mr. Gabbert's office at approximately 1:30 on March 17th; is that correct?

A That's correct.

Q Was Ms. Baker there?

[p. 63] A Yes.

Q And you, in fact, served the Subpoena at that time?

A Yes.

Q Did you have any discussions with Ms. Baker at that time?

A Discussions in reference to what?

Q Any conversation with Ms. Baker at all?

A I don't believe so, no. Except for pleasantries, no.

Q Did you have any conversations with Mr. Gabbert at that time?

A No.

Q Did you at any time state that you were interested in seeking Ms. Baker's cooperation?

A I don't recall. I might have told Ms. Baker that we wanted her cooperation at the time that I attempted an interview with her. I might have even said that in front of Mr. Gabbert when I served her the Subpoena. I don't recall.

Q Was it ultimately determined to obtain a search warrant for Traci Baker's house on March 17, 1994?

A Yes.

Q And when was the decision made to obtain a search warrant?

[p. 64] A I believe on the 17th of March.

Q Was it before or after you served the Grand Jury Subpoena?

MR. MACLATCHIE: I'm going to object at this point. I think the witness can testify that there was a search warrant served and the date it was served.

But since, as I stated earlier, I don't believe - it is not appropriate in this case to litigate the validity, the constitutional validity of that search. I don't believe that any

questions pertaining to the obtaining of that warrant and what went into it is really appropriate since it is the fruits of that warrant's service which formed the basis for the application for the courthouse search warrant in this case.

MS. WIDDIFIELD: Which makes it completely relevant because it is the fruits of that search. So to that extent I'm entitled to go into how that search came about, the process of that search, what that search resulted, and how it led up to what we referred to as the "courthouse search."

MR. MACLATCHIE: You're certainly entitled to what resulted from the search, but there's already been a judicial determination of the 4th amendment validity of the search. So what went into the search warrant application and all of that is not germane or material.

* * *

[p. 72] (Whereupon a recess was taken.)

BY MS. WIDDIFIELD:

Q When we left off, we just had arrived at Traci Baker's house to serve the search warrant on March 18th.

A That's correct.

Q And can you describe for me what happened when you arrived at Ms. Baker's house?

A We knocked on the door.

Q And when you say "we," is it all four of you - Conn, Najera -

A We were all at the door. I don't know who knocked on the door. I believe I did.

She answered the door. And I served the search warrant. I gave her - gave her a copy showing her the original or vice versa. But she ended up with the copy of the search warrant.

Upon reading the search warrant, she made a statement, "I shouldn't tell you this, but all the things that you're looking for are with my attorney."

Q How did this statement come about?

Did she just read the search warrant and spontaneously state that to you?

A That's correct.

Q Did she at any time say that she wanted her

. . .

[p. 88] A After I had the search warrant signed by the Judge, I met up with him, I believe, in the hallway. I don't remember what floor the Grand Jury room is on.

Q But outside of the Grand Jury area?

A Correct.

Q Was he at that time by himself?

A No.

Q Who was he with?

A He was with Carol Najera, David Conn and the secretary, Patty Jo Fairbanks.

Q What was Ms. Fairbanks doing there, if you know?

A She's the secretary for David Conn.

Q Was she there for any particular reason?

A No.

Q How long was she there? Do you know?

A I don't recall.

Q Did you have a conversation with Ms. Najera, Mr. Conn and Mr. Oppenheim in the hallway?

A Yes.

Q Do you recall the substance of that conversation?

A No.

Q Did you see Mr. Gabbert and Ms. Baker anywhere in the Grand Jury area at that time?

[p. 89] A I believe we first saw them in the hallway of the hallway - the court hallway outside of the Grand Jury room.

Q It was your understanding that Mr. Gabbert and Ms. Baker had already met with Mr. Conn at that point?

MR. MACLATCHIE: Objection. Speculation.

BY MS. WIDDIFIELD:

Q You can answer.

A I know that Mr. Gabbert had met with Mr. Conn earlier that morning because that was the substance of the search warrant. Whether Ms. Baker was with him or not, I don't know.

Q If you could tell me what happened after you got to the hallway in the Grand Jury area -

A Whether it occurred outside or within the - I don't know whether you've been to the Grand Jury room itself.

Q Yes.

A But there's actually a counter or an area where you go into an office area. And then from there, there's another room which is a waiting room for the Grand Jury and then the Grand Jury itself.

I know that we met Mr. Gabbert and Traci Baker outside in the hallway. And at what point -

Q Did you speak with him at that point?

[p. 90] A Yes. I had already introduced myself to him when I served Traci Baker the Grand Jury Subpoena the week prior. And I just exchanged pleasantries with them. And at some point - as I said, it was either outside or just inside the Grand Jury area there - he was advised that there was a search warrant for the paperwork, for the correspondence between Lyle Menendez and Traci Baker.

Q Who advised Mr. Gabbert of that?

A I assume when you say "him," you mean Mr. Gabbert?

Q That's correct.

A I believe I did. And at the same time, Elliott Oppenheim chimed in and introduced himself.

Q Do you recall what happened next?

A Next I know that Elliott Oppenheim, for lack of a better term, took over the situation and stated that they

wanted to go to a room where they could be alone as far as conducting the search in confidence.

Q Do you know whether Mr. Gabbert requested that?

A I don't recall.

Was it at the suggestion of Mr. Oppenheim?

A I don't recall.

A But I know that they went into a room - as I said, the first door that you go into as far as the [p. 91] Grand jury room is like an office area with a counter. And they went in a back room behind that counter.

Q Mr. Oppenheim have any envelopes with him?

A I don't recall.

Q He was there as a special master to search an attorney; is that correct?

A That's correct.

Q And if he found any confidential or privileged material, he was supposed to seal that material; is that correct?

MR. MACLATCHIE: Objection. Calls for a legal conclusion from the witness.

BY MS. WIDDIFIELD:

Q You can answer, if you know.

MR. MACLATCHIE: Objection. Calls for speculation as to what privileged material is, as to whether there was anything waived about it, whether he's still

entitled to look at it and make note of what it is before it's put into the envelope. I think there's too many variables. I don't think it's a proper question.

BY MS. WIDDIFIELD:

Q Based on your knowledge and experience of a special master, I take it, it is your understanding that if a special master is aware of what he believes to be

* * *

[p. 95] MS. WIDDIFIELD: Are you directing him not to answer?

MR. MACLATCHIE: Can you answer that question?

THE WITNESS: Yes.

MR. MACLATCHIE: Go ahead.

THE WITNESS: I was aware that if the person being served the search warrant or searched claimed confidentiality, anything that he claims confidential, should be sealed and taken to court.

BY MS. WIDDIFIELD:

Q Thank you very much.

Did you at any time witness Mr. Oppenheim search any of Mr. Gabbert's belongings?

A No.

Q I believe you stated that Mr. Oppenheim went into a separate room with Mr. Gabbert; is that correct?

A That's correct.

Q Were you ever present in that room?

A No.

Q Prior to going into the room with Mr. Oppenheim, did Mr. Gabbert say anything in response to being served with a warrant?

A I'm sure he did. I don't recall what he said, though. I knew that he became very upset.

[p. 96] Q How did you know that he became very upset?

A By his tone.

Q Do you recall in specific anything he said?

A No.

Q Can you describe his tone?

A Angry. Upset.

Q When Mr. Oppenheim went into the separate room with Mr. Gabbert, what did you then do?

A I remained in the waiting area or the conference area of the Grand Jury.

Q Was anybody with you at that time?

A Yes.

Q And who was that?

A I believe Traci Baker was there. At some point in time, Carol Najera and David Conn were there, plus the bailiff.

Q And who was that?

Do you know the bailiff?

A I believe his last name is Fox.

Q Timothy Fox - is that -

A I don't know his first name.

Q Can you tell me how long Mr. Oppenheim was with Mr. Gabbert?

A No.

Q Do you have any idea?

[p. 97] A No.

Q How long were you in the waiting room?

A I was in the waiting room for approximately 15 minutes, maybe 20.

Q And were Mr. Conn and Ms. Najera there the entire time?

A No.

Q Do you know where they went?

A They went into the Grand Jury room.

Q At some point was Ms. Baker called to testify before the Grand Jury?

A At some point, yes.

Q While you were in the waiting room?

A Yes.

Q So it was while Mr. Oppenheim was with Mr. Gabbert?

MR. MACLATCHIE: Objection. Calls for speculation. He's indicated they were out of sight.

BY MS. WIDDIFIELD:

Q Are you aware whether Ms. Baker was called to testify while Mr. Gabbert was with Mr. Oppenheim?

A No. I'm not sure whether that happened because I was called as a witness in the Grand Jury room first, and Traci Baker was after me.

Q Okay.

[p. 98] A I don't know where they were. I don't know when they came back, into the room, at what point. So I can't answer that.

Q How long did you testify before the Grand Jury?

A Approximately a half hour.

Q How long were you waiting with Traci Baker in the waiting room before you were called to testify?

A 15 to 20 minutes.

Q When you came out from testifying before the Grand Jury, did you have any understanding where Mr. Oppenheim or Mr. Gabbert were?

A I believe when I came out, they were in the waiting area of the Grand Jury room.

Q And you became aware at some point that Ms. Baker was called to testify before the Grand Jury?

A That's correct.

Q And do you know was Mr. Gabbert in the vicinity when Ms. Baker was called to testify?

MR. MACLATCHIE: Objection. Vague.

BY MS. WIDDIFIELD:

Q You can answer if you can.

A I'm not sure. Only because when I came out of the Grand Jury room, I know that Traci Baker was going in. And when I came out of the Grand Jury room, itself, [p. 99] Mr. Gabbert was in the waiting area.

Q After you came out from testifying before the Grand Jury, what did you then do?

A I sat down in the waiting room.

Q And then what did you do?

A At some point I spoke to Mr. Oppenheim.

Q Mr. Oppenheim and Mr. Gabbert were in the waiting room with you at this time?

A That's correct.

Q And at that time you had a conversation with Mr. Oppenheim?

A Yes.

Q And what was that conversation?

A Mr. Oppenheim stated that he searched Mr. Gabbert and his property and did not find what was on the search warrant, being the letters from Lyle Menendez to Traci Baker.

Q Was Mr. Conn or Ms. Najera present during this conversation?

A I don't recall. I know that they were either present at that time or he repeated it a couple minutes later when they were present.

Q Was Mr. Gabbert saying anything at this point?

A I don't recall whether he said anything or [p. 100] not.

Q Ms. Baker is before the Grand Jury at this point; is that correct?

MR. MACLATCHIE: As far as you know.

THE WITNESS: As far as I know, that's correct.

BY MS. WIDDIFIELD:

Q Did you at any time search Mr. Gabbert or his possessions?

A Yes.

Q How did that come about?

A After Mr. Oppenheim told me that he didn't find anything as far as what was on the search warrant and he related that to David Conn and Carol Najera, "they," being Carol Najera and David Conn wanted - I'm trying to get the sequence straight here.

At one point Mr. Oppenheim said that there was nothing confidential within his possession. And at that point, David Conn and Carol Najera instructed me to search his briefcase or his paperwork.

Q When Mr. Oppenheim said there was nothing confidential, was this before or after he stated that he searched Mr. Gabbert and didn't find anything responsive to the warrant?

A It was after.

Did he indicate the basis upon which he [p. 101] determined that nothing was confidential?

A No. He did not.

Q Did you ask Mr. Gabbert if you could search his possessions?

Did you ask him for permission?

A I'm not sure whether I asked his permission or whether I advised him that I was going to look through his property.

Q I'd like to direct your attention back to Exhibit 2, which is a copy of Penal Code section 1524. And I would like you to take a look at subsection (3)(e) the second sentence of that section, just the whole section.

A (Witness complies.)

Okay.

Q Have you ever read that section before?

A I have not.

Q Isn't it true that 1524(3)(e) states that nobody but the special master is to search the attorney or a doctor without permission of the person being searched?

MR. MACLATCHIE: Objection. The statute speaks for itself.

Instruct the witness not to answer.

BY MS. WIDDIFIELD:

Q Do you have an understanding of what that [p. 102] provision states?

MR. MACLATCHIE: Objection. That's that same question, asking it a different way.

By MS. WIDDIFIELD:

Q If you can recall for me, Detective Zoeller, what specifically of Mr. Gabbert's possessions you searched.

A When David Conn and/or Carol Najera instructed me to search the items that Elliott Oppenheim deemed not confidential, Mr. Gabbert became very hostile, for lack of better words, and he in turn, opened up his briefcase or folder, whatever he had, and he just started going through - "See, this is what this is."

I never actually touched any of his property. He just started going through the stuff and explaining what each thing was. And as he was doing that, I was looking. That's what it amounted to.

Q Did Mr. Gabbert at any time state that he had provided to Mr. Oppenheim the only document in his possession which was responsive to the search warrant?

A Not that I recall, no.

Q Did he at any time state that what was being viewed was confidential material?

A Not in front of me, no. He was just angry and was just explaining what each thing was.

[p. 103] Q Are you aware whether he stated that to Mr. Oppenheim?

MR. MACLATCHIE: Objection. Speculation.

BY MS. WIDDIFIELD:

Q You can answer, if you know.

A Stated what to Mr. Oppenheim?

Q That any or all of the documents in his possession were confidential or privileged?

A No.

Q At this point in time after you had looked at Mr. Gabbert's documents, do you know whether Mr. Conn or Ms. Najera looked at or looked through Mr. Gabbert's possessions?

A Not that I'm aware of. They were present while he was going through his tirade.

Q So they were looking in the same manner you were?

A I was closer than they were. So I'm not - I don't know whether they were looking at the articles or not.

Q About how far away were you from Mr. Gabbert?

A I was standing at a table, a conference table similar to this one, and Mr. Gabbert was, I believe - I was on one side, and he was on the other side [p. 104] as you are to me.

Q And where were Mr. Conn and Ms. Najera standing?

A They were at the end of the conference table, probably about five or six feet away.

Q And Mr. Oppenheim was present during this period as well?

A I believe so, but I don't have a clear recollection where he was.

Q And Ms. Baker - where was she?

A She was there also. Because at the time when Carol Najera and David Conn had come out of the Grand Jury room, they had taken a break. So everybody was out as far as witnesses and the attorneys.

Q Were you ever aware that there came a point in time when Ms. Baker sought to make contact with her lawyer, with Paul Gabbert, and he was not available?

MR. MACLATCHIE: Objection. Lacks foundation.

BY MS. WIDDIFIELD:

Q You can answer, if you can.

A No. I was not aware of that.

Q Did you ever hear her ask for her lawyer?

A No.

Q When you were in the waiting room with her, did she ever express any concern to you about the

. . .

[p. 119]

State of California)
) SS:
 County of Los Angeles)

I, Joanne Hokyo, Certified Shorthand Reporter No. 9169, in and for the State of California, do hereby certify:

That prior to being examined, Leslie Zoeller, the witness named in the foregoing deposition, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

That said deposition was taken before me pursuant to Notice, at the time and place therein set forth, and was taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

I further certify that I am neither counsel for, nor related to, any party to said action, nor in anywise interested in the outcome thereof.

In witness whereof, I have hereunto subscribed my name this 11th day of August, 1995.

/s/ Joanne Hokyo
 Certified Shorthand Reporter
 For the State of California

EXHIBIT 6

**UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA**

PAUL L. GABBERT,)	
Plaintiff,)	
)	
vs.	)	No. CV 94
DAVID CONN, CAROL NAJERA,	)	4227 RSWL(Ex)
ELLIOT OPPENHEIM, LESLIE)	
ZOELLER)	
AND DOES 1 THROUGH X,)	
Defendants.)	

DEPOSITION OF ELLIOTT OPPENHEIM

**Beverly Hills, California
 June 30, 1995**

**UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA**

PAUL L. GABBERT,)	
Plaintiff,)	
)	
vs.	)	No. CV 94
DAVID CONN, CAROL NAJERA,	)	4227 RSWL(Ex)
ELLIOT OPPENHEIM, LESLIE)	
ZOELLER)	
AND DOES 1 THROUGH X,)	
Defendants.)	

DEPOSITION OF ELLIOT OPPENHEIM,

taken on behalf of the Plaintiff, at 1215 Beverly Estate Terrace, Beverly Hills, California 90210, commencing at 1:47 P.M., Friday, June 30, 1995, pursuant to Notice, before Joanne Hokyo, CSR #9169.

APPEARANCES:

FOR PLAINTIFF PAUL L. GABBERT:

TALCOTT, LIGHTFOOT, VANDEVELDE,
WOEHRLE & SADOWSKY
BY: MELISSA N. WIDDIFIELD
655 South Hope Street
Thirteenth Floor
Los Angeles, California 90017

FOR DEFENDANTS ELLIOT OPPENHEIM AND
LESLIE ZOELLER:

FRANSCCELL, STRICKLAND, ROBERTS &
LAWRENCE
BY: SCOTT D. MACLATCHIE
225 South Lake Avenue
Penthouse
Pasadena, California 91101-3005

FOR DEFENDANTS DAVID CONN AND CAROL
NAJERA:

KEVIN C. BRAZILE
Principal Deputy County Counsel
650 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012
ALSO PRESENT: LESLIE ZOELLER

* * *

[p. 5] your right is going to be taking down everything you say. She will type it into a booklet.

You will then have an opportunity to review the contents of your testimony. You will have an opportunity to make any changes that you see fit to your testimony. However, should you make such changes, counsel will have an opportunity to comment on those changes at the time of trial.

Have you taken any medication today?

A No.

Q And are you generally under a course of medication?

A I think I took a Lasix pill this morning.

Q And what is that for?

A For - it helps urination.

Q What I would like to do - and I will try to speed this up as much as possible so we can get all of us out of your house as soon as possible this afternoon. But I would like to get a little bit of background information.

Can you tell me when you were born?

A January 15, 1912.

Q And when did you go to law school?

A 1937 - wait a minute. In 1932 to 1937.

Q Where did you go to law school?

[p. 6] A Where?

Q Yes.

A Southwestern University.

Q I didn't realize Southwestern was that old. And I take it you had obtained a J.D. Degree at that time?

A Yes.

Q And have you practiced law in Los Angeles since 1937?

A Yes.

Q And can you tell me what the nature of your practice has been over the years?

A General practice. However, specifically, I've been known to have good knowledge of geology and civil engineering. So I've had quite a few of those cases.

Q And when you graduated law school in 1937, did you go work with a firm, or were you in solo practice?

A Solo.

Q And were you in solo practice your entire career?

A Yes.

Q When did you stop active practice?

A About six months ago.

Q What is your current Bar status?

[p. 7] A Inactive.

Q And when did you go inactive?

A About six months ago.

Q Did you ever handle any criminal cases in your practice?

A Oh, a couple when I first started to practice, misdemeanors.

Q And that would have been in the 30's and 40's?

A I think about 1938, '39.

Q So would it be fair to say in the last 20 years, you have not had any criminal practice?

A True.

Q Have you ever been investigated by the State Bar?

A No.

Q Have you ever had a complaint filed against you by the State Bar?

A No.

Q When did you first become a special master?

A It's hard for me to remember. I assume maybe 10 years ago or 8 years ago. I really don't have a clear memory of when.

Q And how did that come about?

A I don't know how to answer that.

* * *

[p. 66]

State of California)
) SS:
 County of Los Angeles)

I, Joanne Hokyo, Certified Shorthand Reporter No. 9169, in and for the State of California, do hereby certify:

That prior to being examined, ELLIOT OPPENHEIM, the witness named in the foregoing deposition, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

That said deposition was taken before me pursuant to Notice, at the time and place therein set forth, and was taken down be [sic] me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

I further certify that I am neither counsel for, nor related to, any party to said action, nor in anywise interested in the outcome thereof.

In witness whereof, I have hereunto subscribed my name this 11th day of July, 1995.

/s/ Joanne Hokyo
 Certified Shorthand Reporter
 For the State of California

EXHIBIT 7

**UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA**

PAUL L. GABBERT,)	
Plaintiff,)	
)	
vs.	)	No. CV 94
DAVID CONN, CAROL NAJERA,	)	4227 RSWL(Ex)
ELLIOT OPPENHEIM, LESLIE)	
ZOELLER)	
AND DOES 1 THROUGH X,)	
Defendants.)	
_____)	

DEPOSITION OF PATTIJO FAIRBANKS

**Los Angeles, California
 August 10, 1995**

**UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA**

PAUL L. GABBERT,)	
Plaintiff,)	
)	
vs.	)	No. CV 94
DAVID CONN, CAROL NAJERA,	)	4227 RSWL(Ex)
ELLIOT OPPENHEIM, LESLIE)	
ZOELLER)	
AND DOES 1 THROUGH X,)	
Defendants.)	
_____)	

DEPOSITOIN OF PATTIJO FAIRBANKS,

taken on behalf of the Plaintiff, at 655 South Hope Street, 13th Floor, Los Angeles, California 90017, commencing at 2:05 P.M., Thursday, August 10, 1995, pursuant to notice, before Jo Ann C. Iwamasa, CSR 7557, RPR.

APPEARANCES:

FOR THE PLAINTIFF:

TALCOTT, LIGHTFOOT, VANDEVELDE,
WOEHRLE & SADOWSKY
BY: MELISSA N. WIDDIFIELD
655 South Hope Street, 13th Floor
Los Angeles, California 90017

FOR THE DEFENDANTS DAVID CONN AND
CAROL NAJERA:

KEVIN C. BRAZILE
Principal Deputy County Counsel
650 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012

FOR DEFENDANTS ELLIOT OPPENHEIM AND
LESLIE OPPENHEIM:

FRANSCCELL, STRICKLAND, ROBERTS, &
LAWRENCE
BY: SCOTT D. MAC LATCHIE
225 South Lake Avenue, Penthouse
Pasadena, California 91101-3005

* * *

[p. 37] recollection.

Q I take it at some point in time, David Conn was there, Carol Najera was there, Elliot Oppenheim was there, and Detective Zoeller was there?

A Yes.

Q When you got there, did you see Traci Baker?

A I'm sure at some point I did.

Q Did you know who she was?

A I'm sure at some point I did.

Q When you got there, what did you do?

A I don't recall.

Q Do you recall what you did during any period of time that you were there?

A With minor exceptions, no.

Q And what are those minor exceptions?

A I recall knocking on the door and telling Mr. Gabbert that his client wanted to see him.

Q Do you recall her being called to go into the grand jury room to testify?

A Not specifically.

Q You saw Elliot Oppenheim serve a search warrant on Paul Gabbert, did you not?

MR. BRAZILE: Objection. Assumes facts not in evidence. Lack of foundation.

[p. 38] Don't guess. Don't speculate. If you saw it, tell her. If you didn't, let her know that.

THE WITNESS: Not specifically.

BY MS. WIDDIFIELD:

Q When you say "not specifically," do you recall generally?

A No.

Q Do you recall, at any time, Detective Zoeller and Elliot Oppenheim being in front of Mr. Gabbert and saying, "We have a search warrant"?

A No.

Q Do you recall Mr. Oppenheim going in a room with Mr. Gabbert?

A No.

Q Did you see Mr. Zoeller look through the belongings of Mr. Gabbert?

A No.

Q Did you see Traci Baker go into the grand jury room?

A I don't know.

Q Was she coming out of the grand jury room when you knocked on the door to Mr. Gabbert?

A No. She had already come out.

Q Mr. Gabbert was in a separate room?

A Yes.

[p. 39] Q And do you know who he was with?

A Mr. Oppenheim.

Q Mr. Oppenheim was, pursuant to his duties as a special master, searching Mr. Gabbert at that time. Isn't that right?

MR. MAC LATCHIE: Objection. Speculation.

MR. BRAZILE: Objection. Calls for speculation. Lack of foundation.

If you saw that happen, you can testify to it, but just because she said you saw it happen doesn't mean you saw it.

Do you understand the difference?

THE WITNESS: Yes.

MR. BRAZILE: All right.

THE WITNESS: What was the question?

BY MS. WIDDIFIELD:

Q Were you aware Mr. Oppenheim was, in performing his duties as a special master, searching Mr. Gabbert in the room that they were in together?

A No.

Q What did you think that they were in the room for?

MR. BRAZILE: Well, objection. Assumes facts not - strike that.

Go ahead and answer.

[p. 40] THE WITNESS: What did I think that they were in the room doing?

BY MS. WIDFIELD:

Q Uh-huh.

MR. BRAZILE: Well, objection. That calls for speculation, but you can answer if you have some idea.

THE WITNESS: No specific idea.

BY MS. WIDFIELD:

Q How was it that you came to knock on the door to get Mr. Gabbert?

A Because Traci Baker was brought out of the grand jury room and they told me she wanted to speak with her attorney.

Q Was she able to speak with her attorney?

A Yes.

Q They had a conversation?

A I don't recall.

Q How do you know she was able to speak with her attorney?

A I put the two of them together.

Q You never saw her speak with him?

A No.

Q When you knocked on the door, what happened?

A I don't recall specifically what happened [p. 41] other than somehow, the door was opened by someone. I informed Mr. Gabbert that his client wanted to talk to him. He came out, and his client was there.

Q Did he say to you, "I can't talk to her right now. I'm being searched"?

A I don't recall exactly the particulars of what happened at that point.

Q Do you recall him saying anything to you?

A Not specifically.

Q Did, at some point, Ms. Baker go back into the grand jury room?

A That I don't specifically recall.

Q Do you have any general recollection?

A No.

Q Do you have any recollection at all of what you did after knocking on the door to get Mr. Gabbert?

A No.

Q How long did you stay in the grand jury room area?

A Probably the whole time.

Q Do you recall ever seeing Ms. Baker come out of the grand jury area again?

A Not specifically.

Q Do you recall seeing Mr. Gabbert and Mr. Oppenheim coming out of the room that they were in?

* * *

[p. 48]

STATE OF CALIFORNIA)
)
 COUNTY OF LOS ANGELES) ss:

I, JO ANN C. IWAMASA, CSR 7557, RPR, do hereby
 certify:

That the foregoing deposition of PATTIJO FAIR-
 BANKS was taken before me pursuant to notice at the
 time and place therein set forth, at which time the witness
 was put under oath by me;

That the testimony of the witness and all objections
 made at the time of the examination were recorded steno-
 graphically by me and were thereafter transcribed:

That the foregoing deposition is a true record of the
 testimony and all objections made at the time of the
 examination.

IN WITNESS WHEREOF, I have subscribed my name
 on this 15th day of August, 1995.

/s/ JoAnn C. Iwamasa

EXHIBIT 8

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

Paul L. Gabbert,)	
Plaintiff,)	
)	
v.	)	CV 94-4227-
David Conn, Carol Najera,	)	RSWL (Ex)
Elliot Oppenheim, Leslie	)	ORDER
Zoeller and Does 1 through	)	(Filed
through [sic] X	)	Sep. 30, 1994)
Defendants.)	
_____)	

Two of the defendants in the above captioned action,
 David Conn and Carol Najera, have moved to dismiss
 Plaintiff Paul L. Gabbert's 42 U.S.C. § 1983 suit. Defen-
 dants Conn and Najera base their Fed. R. Civ. P. 12(b)(6)
 motion to dismiss on, alternatively: absolute immunity;
 qualified immunity; and lack of causation. The matter
 was set for oral argument on September 19, 1994, but was
 removed from the Court's law and motions calendar pur-
 suant to Fed. R. Civ. P. 78, for disposition based on the
 papers filed.

Now, having carefully considered all of the papers
 filed in support of and in opposition to the motion, the
 Court hereby GRANTS in part and DENIES in part
 Defendants' Motion to Dismiss.

I. BACKGROUND

Plaintiff Gabbert is counsel for Tracy Baker, a witness in the recent Menendez brothers murder trial. In March of 1994, Baker was being investigated by the Los Angeles District Attorney's office for perjury during the Menendez trial. Baker was called to testify before a grand jury on this issue.

At the Beverly Hills courthouse on March 21, 1994, as Plaintiff escorted his client to the grand jury hearing, Plaintiff was served with a search warrant by Detective Leslie Zoeller.¹ While Baker testified before the grand jury, Plaintiff's person, briefcase, and accordion file were searched by Special Master Elliot Oppenheim.² Immediately after Oppenheim's search of Plaintiff, Plaintiff was searched again by Detective Zoeller. District attorneys David Conn and Carol Najera, the moving parties in this motion, were present during this second search of Plaintiff.

Plaintiff alleges that the search warrant was obtained illegally, that the material searched was protected by the attorney-client privilege, and that the search went beyond the scope of the warrant. Plaintiff has filed suit under 42

¹ Leslie Zoeller is another defendant in this action but is not a party to this motion to dismiss.

² Oppenheim conducted the first search as a "special master" pursuant to Cal. Penal Code § 1524 (c) (1) which requires the appointment of a special master when a search warrant is issued for documentary evidence in the possession of a lawyer. Oppenheim is another defendant in this action, but is not a party to this motion to dismiss.

U.S.C. § 1983,³ claiming constitutional violations including the sixth amendment right to counsel, fourth amendment, and substantive due process violations.

II. DISCUSSION

A. Standard for Dismissal Under Fed. R. Civ. P. 12(b)(6).

In a Rule 12(b)(6) motion to dismiss, the Court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the non-moving party. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987); *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981). A court need not, however, accept conclusory allegations or unreasonable inferences at face value. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), cert. denied 454 U.S. 1031, 102 S. Ct. 567 (1981). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80

³ 42 U.S.C. § 1983 provides that

every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(1957); see also, *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

In deciding on a Rule 12(b)(6) motion to dismiss, the court generally may not consider material beyond the pleadings. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994). However, material which is properly submitted as part of the complaint may be considered, and documents whose contents are alleged in a complaint, and whose authenticity is not questioned may also be considered, even if the material is not physically attached to the complaint. *Id.* at 454.

B. Defendants Conn and Najera's First Ground For Dismissal: Absolute Immunity as Prosecutors.

Defendants first move that Plaintiff's § 1983 suit be dismissed against them on the grounds that, as prosecutors, they have absolute immunity from suit under § 1983.

The government official seeking absolute immunity bears the burden of showing that such immunity is justified for the action at issue. *Burns v. Reed* ___ U.S. ___, 111 S. Ct. 1934, 1939 (1991). There is a presumption that qualified rather than absolute immunity is generally sufficient to protect government officials. *Id.* Absolute immunity is given sparingly. *Id.*

Prosecutors are entitled to absolute immunity from suit under § 1983 for conduct "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 411, 431, 96 S. Ct. 984, 995 (1976). In determining a prosecutor's immunity, the court looks at

the function performed by the prosecutor, rather than the prosecutor's status as prosecutor.

Prosecutorial activities in initiating and pursuing prosecution are "functions to which the reasons for absolute immunity apply with full force," and prosecutors are entitled to absolute immunity when performing those functions. *Id.* However, prosecutors are not protected by absolute immunity when they act as police investigators rather than as advocates preparing for trial. *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S. Ct. 2606, 2616 (1993). In other words, when a prosecutor performs functions generally performed by detectives or police officers, he receives the immunity usually accorded those actions - i.e., qualified, not absolute immunity.

In order for Defendants to prevail on their claim for absolute immunity, they must show that they were functioning as advocates rather than as investigators. The *Buckley* Court found that a prosecutor cannot be acting as an advocate unless, as a threshold question, he has probable cause to initiate judicial proceedings. Even after a determination of probable cause, the prosecutor who engages in police investigative work receives only qualified immunity. 113 S. Ct. at 2616 & n.5. The question is not whether the conduct is related to the decision of whether to prosecute, but "whether the prosecutor's actions are closely associated with the judicial process." *Burns*, 111 S. Ct. at 1944.

Plaintiff argues that Defendants acted as police investigators, rather than advocates, because the "single purpose of the defendants' conduct was to gather evidence." Opp. at 12. Defendants' purpose, however, is not the

issue here, in that it is possible for prosecutors to be granted absolute immunity for investigative functions which are connected to their role as advocates. *Imbler*, 424 U.S. at 432, 96 S. Ct. at 995 n.33 (noting that the prosecutor's role as advocate involves conduct preliminary to the initiation of prosecution, including other actions outside the courtroom).

Rather, the issue is Defendants' function during those investigations. Preparation for actions undertaken as an advocate may require investigative and administrative conduct which is shielded as connected to the prosecutor's role as advocate. *Id.* As the Supreme Court has stated, "Drawing a proper line between these functions may present difficult questions." *Id.* Similarly, Plaintiff's assertion that Defendants were engaging in "quintessentially investigative conduct" begs the question of what role Defendants acted in while they were engaging in that conduct.

Plaintiff alleges that Defendants' *Conn* and *Najera* delayed Plaintiff at the courthouse under the pretext of supplying Plaintiff with a letter granting his client immunity, until Plaintiff was served with the search warrant. Plaintiff further alleges that *Conn* and *Najera* were present when Plaintiff was served with the search warrant, and that *Conn* introduced Plaintiff to Special Master *Oppenheim*, who conducted the first search. Lastly, Plaintiff alleges that *Conn* and *Najera* were present for the second search and viewed Plaintiff's documents during the search, after *Conn* informed Plaintiff that Special Master *Oppenheim* had determined nothing in the briefcase and files was privileged.

Taking all of the above allegations as true, and making all inferences in favor of the non-moving party as is required on a 12(b)(6) motion, the Court finds that the conduct of Defendants *Conn* and *Najera* constitutes participation in the investigations. Further, the Court finds that these investigations were not connected to Defendants' role as advocates, but, rather, were pre-indictment evidence-gathering more associated with police functions. For those reasons, the Court DENIES Defendants *Conn* and *Najera*'s claim to absolute immunity.

C. Defendants' Second Claim: Qualified Immunity as Government Officials.

Alternatively, Defendants *Conn* and *Najera* move for dismissal of Plaintiff's § 1983 action on the basis of their qualified immunity as government officials. Qualified immunity shields government officials from suit for damages when they perform discretionary functions, and their conduct does not violate clearly established statutory or constitutional rights of which a reasonable official would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). The Ninth Circuit has set out a three prong inquiry for determining qualified immunity: identification of the specific right allegedly violated; determining whether it was so "clearly established" as to alert reasonable officers; and determining the ultimate issue of whether a reasonable officer could have believed the particular conduct was lawful. *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). Because this immunity is an immunity from suit, rather than merely a defense to liability, the Supreme Court has stressed the

importance of resolving immunity questions as early as possible in litigation. *Hunter v. Bryant*, ___ U.S. ___, 112 S. Ct. 534 (1991).

1. Plaintiff's Conduct was Discretionary.

In general, only discretionary conduct by government officials is entitled to qualified immunity. *Harlow*, 457 U.S. at 816, 102 S. Ct. at 2737. Plaintiff contends that Defendants are not entitled to qualified immunity because their conduct in searching him was not discretionary. He contends that the Defendants' alleged supervision and participation in the search of Plaintiff was conduct governed by Cal. Penal Code § 1524(c)(2), which provides for special procedures when a search warrant is issued for documentary evidence in possession of an attorney. Plaintiff argues that, because Cal. Penal Code § 1524 is mandatory, Defendants' conduct was ministerial rather than discretionary and thus outside the scope of behavior protected by qualified immunity.

In order for Plaintiff to state a claim under 42 U.S.C. § 1983, Plaintiff must plead a violation of constitutional or federal law. Plaintiff contends this alleged violation of the state statute resulted in the deprivation of his constitutional rights. However, Plaintiff does not specify the constitutional deprivations to which the alleged violation of Cal. Penal Code § 1524 gives rise.

State law cannot be the basis for a § 1983 claim, unless the violation of the state law also results in a constitutional or federal law violation. *Long v. Norris*, 929 F.2d 1111, 1115 (6th Cir. 1991) (noting that "although

Tennessee prison regulations may create a constitutional entitlement under the due process clause of the fourteenth amendment, they cannot change the standard of analysis for constitutional issues arising under the fourth amendment"). Thus, Plaintiff's argument that Defendants have no qualified immunity on the grounds that they acted ministerially does not succeed, because he fails to state a § 1983 claim on that basis.

The Court finds that Defendants' conduct was discretionary.

2. Whether Defendants Violated Clearly Established Law.

The real issue in determining whether Defendants should be entitled to qualified immunity is whether the law governing their conduct was clearly established so that a reasonable officer would have known the conduct was unlawful. *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738. The threshold determination of whether the governing law was clearly established is a matter of law for the court to decide. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993) (citing *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738). However, where material issues of fact are in dispute, the case must proceed to trial. *Id.*, at 873.

a. Whether Defendants Were the Cause of the Alleged Deprivations.

Plaintiff alleges numerous constitutional violations. The first issue to be determined, however, is whether Defendants were sufficiently involved in the alleged

unconstitutional conduct to be liable under § 1983. Essentially, Plaintiff alleges that Defendants proximately caused the alleged constitutional violations in two ways: a) they directed or supervised others in the unconstitutional behavior; and b) they directly participated in the second search.

i. Vicarious Liability Not a Basis for a § 1983 Claim

Vicarious liability is not a basis for a § 1983 claim. *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 692, 98 S. Ct. 2018, 2036-37 (1978). However, supervision or direct participation in the unlawful conduct is a basis for liability under § 1983. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

ii. Causation Must Be Proximate.

Section 1983 further requires that a defendant's supervision or participation in the allegedly unconstitutional conduct must be the proximate cause of the deprivation. *Arnold v. Intern. Business Machines*, 637 F.2d 1350, 1355 (9th Cir. 1981).

Defendants contend that Plaintiff has failed to allege any direct participation or supervision on the part of Defendants Conn and Najera. They further contend that Plaintiff fails to show that any supervision or participation by Defendants caused the alleged deprivation of Plaintiff's constitutional rights.

Plaintiff's complaint alleges that Conn directed the search of Plaintiff at the courthouse on March 21, 1994 by

Special Master Oppenheim, as well as the search by Detective Zoeller, and states that Najera and Conn were not only present at the search but also "viewed," documents which were searched. It seems clear that Plaintiff's allegations, taken as true, do state facts showing direction and participation by Defendants. Moreover, it is apparent that such direction and participation would be considered a proximate cause of the constitutional deprivations which Plaintiff alleges. Defendants' lack of causation defense thus fails.

b. Alleged Constitutional Violations.

Plaintiff alleges a number of constitutional deprivations caused by Defendants, including substantive due process, fourth amendment, sixth amendment, and fourteenth amendment deprivations.

i. Fourth Amendment Violations.

a. Invalid warrant.

Plaintiff alleges that Defendants Conn and Najera deprived him of his fourth amendment right, as incorporated through the fourteenth amendment, to be secure from unreasonable searches by conducting a search under an invalid warrant. The warrant is invalid, Plaintiff alleges, because it contains two material misstatements of fact made with the knowledge they were false. Under *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684-85 (1978), allegations of deliberate misstatements made by the affiant to a warrant entitle the defendant to an evidentiary hearing on the validity of the warrant. The

Franks standard also defines the scope of qualified immunity in civil rights actions. *Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th Cir. 1991) (*Branch I*). (citing *Rivera v. United States*, 928 F.2d 592, 604 (2d Cir. 1991)). However, Plaintiff does not allege that the actual affiant, Detective Zoeller, made the statements with the knowledge of their falsity, or with reckless disregard of the truth, as *Franks* requires. 438 U.S. at 171, 98 S. Ct. at 2684.

Additionally, Defendants respond that, even if the false statements were made intentionally or in reckless disregard of the truth, there is sufficient other material in the affidavit to support a finding of probable cause, which under *Franks* excuses the inaccuracies. *Id.* at 171-72, 98 S. Ct. at 2684. Defendants point to the affidavit as containing a statement from Plaintiff's client that the primary object of the search warrant, the alleged letter, had been turned over to Plaintiff.⁴ The affidavit states that Tracy Baker, Plaintiff's client, had informed the affiant that she had turned over the Menendez correspondence to her attorney, Plaintiff. This statement would be enough to support the issuing of the search warrant against Plaintiff Gabbert, even without the allegedly false statements.

Thus, the warrant is valid under either of Plaintiff's arguments, and the search conducted pursuant to it is likewise valid. The search was not clearly unlawful on the

⁴ The affidavit and search warrant were attached to Plaintiff's complaint. Material such as subpoenas and search warrants attached as exhibits to plaintiff's complaint may properly be considered on a motion to dismiss. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) (*Branch II*).

grounds of an invalid warrant, and under *Harlow*, Conn and Najera are entitled to qualified immunity on the charge that the search under the allegedly invalid warrant violated Plaintiff's fourth amendment rights.

b. Impermissibly Broad Execution of Warrant.

Secondly, Plaintiff alleges that Oppenheim's, first search violated the fourth amendment because the search went beyond the scope of the warrant.⁵ He further alleges that the second search was invalid because it was "repetitive."

The warrant authorized a search of Plaintiff for "any and all correspondence between Tracy Baker and Lyle Menendez." (Complaint, Ex. C.). Plaintiff alleges that Oppenheim's search of Plaintiff's eyeglass case, memorandum calendar, and wallet/pocketbook went beyond the scope of the warrant because such correspondence would not reasonably be expected to be within those objects.

Police may search all items which legitimately might contain the objects specified in the warrant. *United States v. Grandstaff*, 813 F.2d 1353, 1358 (9th Cir. 1987); *United States v. Disla*, 805 F.2d 1340, 1347 (9th Cir. 1986). The warrant in question was for "correspondence." By definition, correspondence may include letters and notes on

⁵ The following discussion of Oppenheim's search assumes, without determining, that Defendants Conn and Najera directed that search and thus were a cause of the alleged constitutional deprivation.

small pieces of paper. Such small pieces of paper might have been placed within Plaintiff's eyeglass case, wallet, or calendar. The search of Plaintiff therefore did not go beyond the scope of the warrant and thus was not a violation of the fourth amendment on those grounds. On these grounds, Plaintiff cannot show that the search was clearly unlawful so as to overcome Defendants' claim to qualified immunity under *Harlow*.

Plaintiff further alleges that the second search of his personal effects was unauthorized by the warrant because it was "repetitive" and thus violated his rights under the fourth amendment. Plaintiff cites no case law to support his proposition that such searches are unreasonable. On the contrary, courts have allowed "second" searches under the same warrant, as long as the subsequent search could be considered a continuation of the first search. *United States v. Kaplan*, 895 F.2d 618, 623 (9th Cir. 1990) (holding that officer who visited defendant's offices to obtain specific files was allowed to return several hours later; second entry was considered continuation of the search); *United States v. Carter*, 854 F.2d 1102, 1107 (8th Cir. 1988) (officer's return to a motel room, several hours after a search, was valid because the authority of the search warrant had not expired).

The second search conducted by Zoeller on Plaintiff occurred soon after the first search conducted by Oppenheim, and thus would be considered a continuation of Oppenheim's search under *Kaplan*. In any event, the second search was not clearly unlawful so that a reasonable officer should have known it was illegal. The second search, like the first search, therefore does not meet the *Harlow* test for overcoming qualified immunity.

c. Violation of Cal. Penal Code § 1524

Plaintiff alleges that the search was unconstitutional on a third ground, because it was allegedly conducted in violation of Cal. Penal Code § 1524, as discussed above in section II.C.1. Again, a § 1983 claim must be premised on the violation of federal law or constitutional provision. *Long v. Norris*, 929 F.2d at 1114. The violation of Cal. Penal Code § 1524 in and of itself does not constitute a fourth amendment violation, nor does Plaintiff clearly allege that his substantive due process rights were violated by the alleged violation of the state statute. Officials sued for constitutional violations do not lose their qualified immunity in § 1983 actions merely because their conduct violates some state statutory or administrative provision. *Davis v. Scherer*, 468 U.S. 183, 194, 104 S. Ct. 3012, 3019 & n.12 (1984). The violating conduct must violate clearly established federal law. *Elder v. Holloway*, ___ U.S. ___, 114 S. Ct. 1019, 1023 (1994) (unanimous decision),

Even if Plaintiff alleged that Defendants' failure to follow the procedural requirements of Cal. Penal Code § 1524 constituted a fourteenth amendment deprivation, his claim would fail. While state law may create a property interest protected by the fourteenth amendment, a substantive property right cannot exist exclusively by virtue of a procedural right. *Dorr v. County of Butte*, 795 F.2d 875, 876, 877 (9th Cir. 1986).

ii. Intrusion into Client Relationships
as a Sixth Amendment Violation

Plaintiff alleges that Defendants, by causing the search warrant to be served upon him and participating in the search, rendered him incommunicado from his client who was simultaneously testifying before the grand jury, thereby violating his client's sixth amendment right to effective counsel.

a. Plaintiff's Standing to Raise His
Client's Sixth Amendment
Claim

Plaintiff has standing to assert his client Baker's sixth amendment claim⁶ under *Wounded Knee Legal Defense/Offense Com. v. FBI*, 507 F.2d 1281, 1284 (8th Cir. 1974) ("[A] lawyer has standing to challenge any act which interferes with his professional obligation to his client and thereby, through the lawyer, invades the client's constitutional right to counsel."); *Keker v. Procunier*, 398 F. Supp. 756, 765 (E.D. Cal. 1975) (counsel forced to meet their imprisoned clients in poor conditions had standing to raise their clients' sixth amendment claims).

⁶ The record does not state whether or not Baker is actually a defendant in a criminal proceeding, although it appears that she was the object of a grand jury investigation. A violation of the attorney-client privilege implicates the sixth amendment only when it applies to the relationship between a criminal defendant and his attorney. *Partington v. Gedan*, 961 F.2d 852, 863 (9th Cir. 1992).

b. Interference with Attorney-Client Relationship and Prevention of Effective Counsel as a Sixth Amendment Violation

The question here is whether, for purposes of the *Harlow* test for qualified immunity, the law governing Defendants' behavior in searching Plaintiff and arguably interfering with his client's sixth amendment right to counsel was clearly established.

Plaintiff alleges that the serving of the search warrant upon him just as his client was called to testify in front of the grand jury was an interference with his client's sixth amendment right to effective assistance of counsel. Because of the serving of the search warrant and Oppenheim's subsequent search of Plaintiff, Plaintiff claims that his client was prevented from consulting with him immediately before and during her grand jury testimony. Plaintiff argues that this constitutes a violation of the Sixth Amendment.

Leaving aside the causation question of whether Defendants Conn and Najera were actually involved in timing the service of the search warrant to interfere with Plaintiff's representation of his client, the issue is whether such alleged interference is a violation of Baker's sixth amendment right to effective counsel. Governmental interference with the attorney-client relationship will constitute a violation of the sixth amendment only if the interference substantially prejudices the defendant. *United States v. Irwin*, 612 F.2d 1182, 1186-1187 (9th Cir. 1980); see *United States v. Glover*, 596 F.2d 857, 863-64 (9th Cir. 1979). Plaintiff makes no allegation that his client was

substantially prejudiced by his unavailability. For that reason, the law is not clearly established that Defendants' alleged interference⁷ with Plaintiff's representation of his client was unlawful. Under *Harlow* Defendants Conn and Najera are thus entitled to qualified immunity on this issue.

c. Defendant's Contact of Plaintiff's Client as a Violation of Sixth Amendment

Plaintiff further alleges that Defendants Conn and Najera violated his client's sixth amendment rights by questioning her during a search of her home on March 18, 1994, despite knowing that she was represented by counsel, in violation of Cal. Prof. R. conduct 2-100 (West Supp. 1994). Cal. Prof. R. Conduct 2-100 (A) provides that

While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

This rule has been found to apply to prosecutors pursuing a criminal case. *United States v. Lopez*, 4 F.3d 1455, 1459 (9th Cir. 1993). However, while Defendants Conn and Najera are bound by this rule and allegedly may have violated it, Plaintiff does not allege that this violation "substantially prejudiced" his client so that, under

⁷ Again, the Court assumes without determining that causation exists, even though Defendants Conn and Najera's causation of the alleged interference is far from clear.

United States v. Irwin, his client's sixth amendment rights have been violated. Further, as discussed above, violations of state law do not provide a claim under § 1983 unless the violations in some way implicate a violation of constitutional rights.

d. Invasion of Attorney-Client Privilege.

Plaintiff alleges that the search of his briefcase and files invaded the attorney-client privilege because privileged documents were viewed during the searches, and that his clients' sixth amendment rights were violated as a result. Plaintiff's allegations again fail to state a clearly established constitutional violation.⁸ "[S]tanding alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right." *Partington v. Gedan*, 961 F.2d 852, 863 (9th Cir. 1992)(quoting *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985)). Unless the interference with the attorney-client privilege substantially prejudices the defendant, an intrusion on the confidential relationship between a defendant and his attorney does not constitute a sixth amendment violation. *Partington*, 961 F.2d at 863; *Clutchette*, 770 F.2d at 1471 (citing *United States v. Irwin*).

⁸ Plaintiff alleges that not only Baker's files but other clients' files were viewed during this search. Plaintiff's clients whose files were viewed may have a privacy interest in the files, but Plaintiff does not have standing to raise his clients' fourth amendment claims. *DeMassa v. Nunez*, 770 F.2d 1505, 1506, 1507 (9th Cir. 1985).

Thus, case law does not establish that Defendants' conduct was clearly a violation of the sixth amendment. Again, Plaintiff fails to allege that his client was substantially prejudiced by Defendant's alleged interference with the attorney-client privilege. Thus, under *Harlow*, Defendants have a qualified immunity to Plaintiff's claim.

iii. Plaintiff's Fourteenth Amendment Right to Practice His Profession

Plaintiff alleges that Defendants' conduct interfered with his fourteenth amendment interest in practicing his profession. Such a right has been found to exist. *Keker v. Procunier*, 398 at 756; see *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972). At least one district court has found that prison officials impermissibly interfered with attorneys' fourteenth amendment rights when attorneys were forced to meet their clients in an overly warm interview room in which glass partitions hampered attorneys' ability to consult with their clients. *Kecker*, 398 F. Supp. at 761.

To show that a right allegedly violated is "clearly established by law" under the *Harlow* test,

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 3039 (1987) (citations omitted).

Defendants' alleged plan to serve the search warrant upon Plaintiff as his client began testifying before the grand jury is arguably an interference with Plaintiff's fourteenth amendment right to practice his profession. Plaintiff contends that as a result of the serving of the search warrant and the subsequent search, he was prevented from advising his client immediately before and during the grand jury hearing, when his client specifically twice sought to consult with him. Additionally, when Plaintiff stated that his client's appearance needed to be delayed during his search, his client was instead ordered to immediately appear in front of the grand jury.

Viewing the evidence most favorably for Plaintiff on this motion to dismiss the court finds that Defendants did violate Plaintiff's clearly established fourteenth amendment to practice his profession free from undue governmental interference. The Court thus DENIES Plaintiff's motion to dismiss this claim.

c. Substantive Due Process "Shocks the Conscience" Claim.

Lastly, Plaintiff claims that Defendants' conduct is so egregious that it "shocks the conscience" and violates substantive due process notions of decency and fairness. This "shock the conscience" test was first expressed in *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209 (1952), where police officers in search of evidence forcibly pumped the stomach of a criminal suspect. This type of

substantive due process claim has most often been invoked in relation to police brutality and unwanted body manipulation, but has also been applied to relentless questioning of a suspect. *Cooper v. Dupnik*, 963 F.2d 1220, 1249, 1250 (9th Cir. 1992).

The Supreme Court has not set out specific standards for the test. *Id.* The Court finds here that Defendants' alleged conduct was not so lacking in decency and fairness that their actions violated Plaintiff's substantive due process right. Thus, Defendants have qualified immunity for Plaintiff's substantive due process claim.

D. Qualified Immunity No Defense to Injunctive Relief

Qualified immunity is not a defense to a claim for injunctive relief. *American Fire v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991). Plaintiff petitions for both damages and injunctive relief. As discussed above, Plaintiff's claim for damages should be dismissed on the grounds that Defendants have qualified immunity which protects them from civil suits for damages, but Plaintiff's claim for injunctive relief is more appropriately considered on a motion for summary adjudication.

E. Leave to Amend Complaint

Fed. R. Civ. P. 15(a) states that leave to amend pleadings "shall be freely given when justice so requires." However, leave may be denied when amendment would cause undue delay, would be made in bad faith, would be futile, or would cause prejudice to the opposing party.

Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973). Leave to amend need not be granted if the court determines that allegation of other facts consistent with the challenged pleading could not correct the deficiency. *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988); *Schreiber Dist. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

In this case, the Court determines that it would be futile to grant Plaintiff leave to amend his pleadings in regard to his First Claim for damages, which alleges fourth amendment violations, and his Second Claim for damages, subsections (c) (alleged violation of fourth and fourteenth amendments based on Cal. Penal Code § 1524) (e) (alleged violation of sixth and fourteenth amendment based on Cal. R. Prof. Conduct 2-100), and (f) (alleged violation of attorney-client privilege). The Court thus dismisses those claims without leave to amend.

IV. CONCLUSION

Defendants Conn and Najera's Rule 12(b)(6) motion to dismiss is hereby **DENIED** as to subsection (d) of Plaintiff's Second Claim for the violation of his fourteenth amendment right to practice his profession, and as to Plaintiff's claims for injunctive and declaratory relief. Defendants' Rule 12(b)(6) motion to dismiss is hereby **GRANTED** on the basis of qualified immunity as to Plaintiff's remaining claims for damages against Defendants Conn and Najera. Plaintiff's claims for fourth amendment violations, violations of the attorney-client privilege, violations of Cal. Rule Prof. Conduct 2-100, and

violations of Cal. Penal Code § 1524 are **DISMISSED
WITH PREJUDICE.**

IT IS SO ORDERED.

RONALD S W LEW
RONALD S.W. LEW
United States District Judge

DATED: September 27, 1994

CV 94-4227-RSWL *Gabbert v. Conn, Najera et al.*, Defen-
dants Conn and Najera' 12(b)(6) motion to dismiss.

(Gabbert1.order/j)

EXHIBIT 9
THE GRAND JURY OF THE
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

IN RE GRAND	)	CASE NO.
JURY INVESTIGATION.	)	(NONE)
	)	(SECRET)
)	
)	

REPORTER'S PARTIAL TRANSCRIPT
OF GRAND JURY PROCEEDINGS

(WITNESS: TRACI LE BAKER)

MONDAY, MARCH 21, 1994

APPEARANCES:

DAVID CONN, CAROL NAJERA, DEPUTIES
DISTRICT ATTORNEY OF THE COUNTY OF
LOS ANGELES, REPRESENTING THE OFFICE
OF THE DISTRICT ATTORNEY.

TERRY L. WHITE, DEPUTY DISTRICT ATTOR-
NEY OF LOS ANGELES COUNTY AND LOS
ANGELES COUNTY GRAND JURY ADVISOR.

RICHARD B. COLBY, CSR 1080, DULY
APPOINTED AND SWORN AS THE OFFICIAL
STENOGRAPHIC REPORTER OF THE LOS
ANGELES COUNTY GRAND JURY.

RICHARD B. COLBY, CSR 1080
OFFICIAL REPORTER

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[p. 1] LOS ANGELES, CALIFORNIA;
MONDAY, MARCH 21, 1994
10:20 A.M.

(AT THE BEGINNING OF THESE PROCEEDINGS,
19 GRAND JURORS WERE PRESENT.)

THE FOREPERSON: THIS HEARING IS NOW
IN SESSION.

MADAME SECRETARY, WHAT IS THE STATUS OF
THE ROLL?

(ROLL CALLED.)

THE SECRETARY: LET THE RECORD
REFLECT THERE ARE NINETEEN GRAND JURORS
PRESENT THIS MORNING.

THE FOREPERSON: GOOD MORNING, MR.
COLBY. PLEASE RAISE YOUR RIGHT HAND. I WILL
NOW SWEAR IN THE COURT REPORTER.

(THE GRAND JURY COURT REPORTER, RICHARD
B. COLBY, WAS SWORN AS FOLLOWS:)

THE FOREPERSON: YOU DO SOLEMNLY
SWEAR THAT YOU WILL CORRECTLY TAKE IN
SHORTHAND AND CORRECTLY TRANSCRIBE, TO
THE BEST OF YOUR ABILITY, ALL OF THE TESTI-
MONY GIVEN BY EACH AND EVERY WITNESS TESTI-
FYING IN THE MATTER NOW PENDING BEFORE THIS
GRAND JURY, AND THAT YOU WILL KEEP SECRET
AND DIVULGE [p. 2] TO NO ONE ANY OF THE PRO-
CEEDINGS OF THIS GRAND JURY, SO HELP YOU GOD.

THE REPORTER: I DO.

THE FOREPERSON: I WILL NOW READ THE
FOREMAN'S STATEMENT.

(PAGES 3 THROUGH A PORTION OF 24
ARE NOT INCLUDED PER THE COURT'S
MINUTE ORDER OF 5-19-5, A COPY
OF WHICH IS ATTACHED HERETO.)

* * *

[p. 24] MS. NAJERA: MADAME FOREMAN,
AT THIS TIME WE WOULD LIKE TO CALL TRACI
BAKER.

THE FOREPERSON: TRACI BAKER?

THE WITNESS: YES.

THE FOREPERSON: PLEASE RAISE YOUR
RIGHT HAND.

DO YOU SOLEMNLY SWEAR THAT THE EVI-
DENCE YOU SHALL GIVE IN THIS MATTER NOW
PENDING BEFORE THE GRAND JURY OF THE
COUNTS TEA QF LOS ANGELES, SHALL BE THE

TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

THE WITNESS: YES, MA'AM.

THE FOREPERSON: PLEASE BE SEATED.

MISS BAKER, PLEASE STATE AND SPELL YOUR FULL NAME, SPEAKING DIRECTLY INTO THE MICROPHONE.

THE WITNESS: FIRST NAME FIRST?

OKAY.

TRACI, T-R-A-C-I, LE, L-E, BAKER, B-A-K-E-R.

THE FOREPERSON: YOU MAY PROCEED.

[p. 25] MS. NAJERA: THANK YOU.

TRACI LE BAKER,

CALLED AS A WITNESS BEFORE THE LOS ANGELES COUNTY GRAND JURY, WAS DULY SWORN AND TESTIFIED AS FOLLOWS:

EXAMINATION

BY MS. NAJERA:

Q. MISS BAKER, ARE YOU ACQUAINTED WITH THE DEFENDANT LYLE MENENDEZ?

A. AT THIS TIME, I WASN'T ABLE TO SPEAK WITH MY ATTORNEY. HE'S STILL WITH THE SPECIAL MASTER.

MAY I ASK PERMISSION TO GO AND CONFER WITH HIM FOR A MOMENT?

THE FOREPERSON: IF THE SERGEANT-AT-ARMS WOULD PLEASE ESCORT MISS BAKER TO THE DOOR SO SHE MAY SPEAK WITH HER ATTORNEY.

(THE WITNESS EXITS THE GRAND JURY HEARING ROOM.)

THE SERGEANT-AT-ARMS: MADAME FOREMAN, IT IS GOING TO BE A FEW MINUTES.

THE FOREPERSON: THANK YOU.

MS. NAJERA: MADAME FOREMAN, MAY WE HAVE PERMISSION TO LEAVE THE GRAND JURY ROOM FOR A MOMENT?

THE FOREPERSON: YES, YOU MAY.

[p. 26] (THE DEPUTIES DISTRICT ATTORNEY EXIT THE GRAND JURY HEARING ROOM.)

(SHORT PAUSE.)

THE FOREPERSON: BACK ON THE RECORD.

MS. NAJERA: WE WOULD RECALL TRACI BAKER.

THE FOREPERSON: THANK YOU.

THE FOREPERSON: MISS BAKER, YOU WILL RECALL THAT YOU HAVE PREVIOUSLY BEEN SWORN AND ARE STILL UNDER OATH.

THE WITNESS: YES.

THE FOREPERSON: YOU MAY PROCEED.

MS. NAJERA: THANK YOU.

Q. MISS BAKER, ARE YOU ACQUAINTED WITH THE DEFENDANT LYLE MENENDEZ?

A. BASED ON THE ADVICE OF MY COUNSEL, I RESPECTFULLY DECLINE TO ANSWER THE QUESTION BECAUSE MY ANSWER MIGHT TEND TO INCRIMINATE ME.

Q. DID YOU KNOW HIM ON AUGUST - DURING AUGUST OF 1989?

A. AGAIN, I HAVE TO GO CONFER WITH COUNSEL.

I APOLOGIZE IF IT'S INCONVENIENT, BUT THIS IS WHAT I HAVE BEEN INSTRUCTED TO DO.

MAY I DO THIS?

THE FOREPERSON: THE SERGEANT-AT-ARMS WILL ESCORT MISS BAKER TO THE DOOR TO COMPLY WITH HER REQUEST TO SPEAK WITH HER COUNSEL.

[p. 27] (THE WITNESS EXITS THE GRAND JURY HEARING ROOM.)

(SHORT PAUSE.)

THE FOREPERSON: MISS BAKER, LET ME REMIND YOU THAT YOU ARE STILL UNDER OATH.

THE WITNESS: THANK YOU.

Q. BY MS. NAJERA: AND THE QUESTION I ASKED YOU WAS:

DID YOU KNOW HIM IN AUGUST OF 1989?

A. AGAIN, BASED ON THE ADVICE OF COUNSEL, I RESPECTFULLY DECLINE TO ANSWER THE QUESTION BECAUSE MY ANSWER MIGHT TEND TO INCRIMINATE ME.

Q. WHEN YOU WERE SERVED WITH A SUBPOENA FOR THIS GRAND JURY PROCEEDING, IT WAS ALSO ORDERED THAT YOU BRING WITH YOU SOME DOCUMENTS RELATING TO YOUR CORRESPONDENCE WITH LYLE MENENDEZ.

DID YOU BRING THESE DOCUMENTS?

A. I'M GOING TO HAVE TO AGAIN CONFER. I'M SORRY.

MR. CONN: BEFORE THE WITNESS GETS UP, MADAME FOREMAN, I THINK AT THIS POINT WE MAY NEED THE PRESIDING JUDGE TO DETERMINE WHETHER OR NOT THE ANSWER MAY TEND TO INCRIMINATE THE WITNESS.

I THINK THIS IS A QUESTION THAT WILL CLEARLY NOT INCRIMINATE.

SHE IS UNDER GRAND JURY SUBPOENA TO PRODUCE THE [p. 28] DOCUMENTS.

SHE'S FAILED TO PRODUCE THE DOCUMENTS, AND WE WILL ASK THAT SHE BE HELD IN CONTEMPT OF THIS COURT BY THE PRESIDING JUDGE.

MR. WHITE: MADAME FOREMAN, MAY WE TO A A [sic] 10-MINUTE RECESS, ORDER THE WITNESS BACK IN 10 MINUTES, SO I CAN CONFER WITH THE PRESIDING JUDGE?

THE FOREPERSON: MISS BAKER, YOU ARE EXCUSED AND ORDERED TO RETURN IN 10 MINUTES TO THIS HEARING ROOM WITHOUT FURTHER SUBPOENA, REMINDER OR ORDER.

DO YOU UNDERSTAND?

THE WITNESS: YES.

YOU ARE ADMONISHED NOT TO REVEAL TO ANY OTHER PERSON, EXCEPT AS ORDERED BY THE COURT, WHAT QUESTIONS WERE ASKED OF YOU AND WHAT RESPONSES WERE GIVEN.

IN ADDITION, YOU ARE NOT TO REVEAL ANY OTHER MATTERS CONCERNING THE NATURE OR SUBJECT OF THE INVESTIGATION WHICH YOU LEARNED DURING YOUR APPEARANCE HERE, UNLESS AND UNTIL SUCH TIME AS A TRANSCRIPT OF THESE PROCEEDINGS IS MADE PUBLIC.

I WISH TO ADVISE YOU ALSO THAT A VIOLATION OF THIS ORDER CAN BE THE BASIS OF A CONTEMPT CHARGE AGAINST YOU.

DO YOU UNDERSTAND?

THE WITNESS: YES.

THE FOREPERSON: THANK YOU.

YOU ARE EXCUSED.

THE WITNESS: OKAY.

[p. 29] (THE WITNESS EXITS THE GRAND JURY HEARING ROOM.)

THE FOREPERSON: WE ARE IN RECESS FOR 10 MINUTES.

THE GRAND JURORS ARE ADMONISHED THAT THEY ARE NOT TO FORM OR EXPRESS ANY OPINIONS ABOUT THIS CASE OR DISCUSS IT AMONG THEMSELVES UNTIL THE MATTER COMES BEFORE US FOR DELIBERATION.

WE ARE IN RECESS FOR 10 MINUTES.

(SHORT RECESS TAKEN.)

[p. 30] THE FOREPERSON: THIS HEARING IS NOW IN SESSION.

THE SECRETARY: THE SAME NINETEEN GRAND JURORS PRESENT AT THIS MORNING'S ROLL CALL ARE NOW PRESENT.

THE FOREPERSON: THANK YOU.

YOU MAY PROCEED.

MS. NAJERA: THANK YOU, MADAME FOREMAN.

AT THIS TIME, THE PEOPLE WOULD RECALL TRACI BAKER.

THE SERGEANT-AT-ARMS: EXCUSE ME, MADAME FOREMAN.

HE'S GOING TO NEED A COUPLE MINUTES WITH HER.

(SHORT PAUSE.)

MR. WHITE: LET'S HAVE THE SERGEANT-AT-ARMS TELL HER TO COME IN NOW.

THE FOREPERSON: MISS BAKER, IF YOU WOULD PLEASE RESTATE YOUR NAME FOR THE RECORD.

THE WITNESS: TRACI L. BAKER.

THE FOREPERSON: AND I REMIND YOU THAT YOU ARE STILL UNDER OATH.

THE WITNESS: YES.

THE FOREPERSON: YOU MAY PROCEED.

MR. WHITE: JUST GO TO YOUR STATEMENT.

THE FOREPERSON: MISS BAKER, YOU ARE ORDERED TO GO TO DEPARTMENT 110 OF THE SUPERIOR COURT FOR CONTEMPT PROCEEDINGS REGARDING YOUR FAILURE TO PRODUCE THE DOCUMENTS REQUESTED BY THE GRAND JURY SUBPOENA.

MISS BAKER, I DECLARE YOU TO BE IN CONTEMPT OF [p. 31] THIS GRAND JURY.

THE SHERIFF IS ORDERED TO TRANSPORT YOU FORTHWITH TO DEPARTMENT 110 OF THE SUPERIOR COURT FOR FURTHER PROCEEDINGS REGARDING THIS CONTEMPT.

I FURTHER DIRECT THE GRAND JURY LEGAL ADVISOR, DEPUTIES DISTRICT ATTORNEY AND THE COURT REPORTER TO PROCEED IMMEDIATELY TO

DEPARTMENT 110 FOR FURTHER PROCEEDINGS IN THIS MATTER.

(THE WITNESS EXITS THE GRAND JURY HEARING ROOM.)

THE FOREPERSON: THE GRAND JURY IS NOW IN RECESS IN THIS MATTER.

DO WE NEED TO BE ADMONISHED IN THIS?

MR. WHITE: LET'S GO BACK ON THE RECORD SO SHE CAN DO SOMETHING.

THE FOREPERSON: WE ARE BACK ON THE RECORD OUT OF THE PRESENCE OF THE WITNESS.

MS. NAJERA: THE ONLY TWO DOCUMENTS THAT WE HAVE MARKED FOR PURPOSE OF THIS HEARING, EXHIBITS 1 AND 2, WE WOULD ASK THAT THEY BE PUT IN EVIDENCE RIGHT NOW.

THE FOREPERSON: SO ORDERED.

(RECEIVED IN EVID.: = EXHIBITS 1 & 2.)

THE FOREPERSON: THE GRAND JURORS HAVE BEEN ADMONISHED REGARDING DISCUSSION OF THE CASE.

PLEASE REMEMBER AND FOLLOW THE ADMONITION.

THE GRAND JURY IS NOW IN RECESS IN THIS [p. 32] MATTER.

(RECESS TAKEN.)

[p. 33] LOS ANGELES, CALIFORNIA;
 MONDAY, MARCH 21, 1994
 DEPARTMENT NO. 110
 HON. FLORENCE MARIE COOPER, JUDGE
 11:40 A.M.

THE COURT: WE ARE ON THE RECORD IN CHAMBERS.

I AM SUBSTITUTING FOR DEPARTMENT 100 ON THE MOTION TO QUASH A GRAND JURY SUBPOENA IN GRAND JURY PROCEEDINGS.

TRACI BAKER IS THE PERSON UNDER INVESTIGATION IN THIS PROPOSED INDICTMENT.

IS THAT CORRECT, MR. WHITE?

MR. WHITE: YES.

IT IS NOT AN INDICTMENT. IT IS JUST AN INVESTIGATORY HEARING. SO THEY WEREN'T SEEKING AN INDICTMENT.

THE COURT: BECAUSE THAT'S PART OF WHAT I NEED TO UNDERSTAND BEFORE I CAN DO MUCH OF ANYTHING WITH THIS.

TELL ME THE DIFFERENCE BETWEEN A PLAIN INVESTIGATORY PROCEEDING AND SOMETHING THAT'S HEADING TOWARD INDICTMENT.

WHAT IS THIS?

MR. WHITE: THE MAIN DIFFERENCE IS JUST AS IT'S STATED.

THE DISTRICT ATTORNEY WILL COME IN AND THEY ARE ONLY INVESTIGATING A POSSIBLE CRIMINAL ACTION, BUT THEY WON'T BE REQUESTING AN INDICTMENT HEARING AT THAT TIME.

IT COULD LATER TURN INTO AN INDICTMENT OR IT COULD JUST BE A PROCEDURE FOR THE DISTRICT ATTORNEY'S [p. 34] OFFICE TO GAIN INFORMATION.

IN THIS PROCEEDING, THEY WERE NOT REQUESTING AN INDICTMENT AT THIS TIME.

THE COURT: BUT IF SOMEONE IS GOING TO BE INDICTED AS A RESULT OF THIS INVESTIGATION, IT'S PROBABLY TRACI BAKER?

MR. WHITE: YES.

THE ALLEGATIONS ARE POSSIBLE PERJURY REGARDING HER TESTIMONY IN THE MENENDEZ TRIAL.

THE COURT: JUST THROUGH THE MEDIA, I THINK I UNDERSTAND WHY THIS INVESTIGATION IS ON GOING.

THERE HAS BEEN AN INDICATION THAT A LETTER WAS WRITTEN BY ERIC OR LYLE -

MR. WHITE: I BELIEVE IT WAS WRITTEN BY LYLE.

THE COURT: - LYLE TO THIS WITNESS INSTRUCTING HER HOW TO TESTIFY.

AND OBVIOUSLY THESE PROCEEDINGS INVOLVE A GRAND JURY SUBPOENA TO MISS BAKER TO PRODUCE ANY CORRESPONDENCE FROM LYLE MENENDEZ.

MR. WHITE: THAT'S CORRECT.

MY CONCERN, CERTAINLY, IS EXPRESSED BY HER ATTORNEY THAT THE PRODUCTION OF ANY SUCH CORRESPONDENCE COULD TEND TO INCRIMINATE HER.

AND IF, IN FACT, SHE'S THE FOCUS OF THIS INVESTIGATION, THERE WOULD APPEAR TO BE SOME MERIT TO THAT.

THE COURT: I WOULD IMAGINE WHAT WE NEED TO DO IS TO PROCEED WITH A CLOSED HEARING IN THIS COURTROOM.

IS MISS BAKER THERE ALONG WITH HER ATTORNEY?

[p. 35] MR. WHITE: MISS BAKER IS HERE.

HER ATTORNEY IS OUTSIDE, BUT HE IS PREPARED TO COME IN IF SHE REQUESTS HIS APPEARANCE, WHICH I BELIEVE SHE WILL.

THE COURT: I BELIEVE THAT'S PRETTY PREDICTABLE.

I THINK THAT'S WHAT WE ARE GOING TO HAVE TO DO, THEN, WE CAN DO IT IN THE COURTROOM. BECAUSE I CAN SIMPLY LOCK THE COURT.

IT'S ALMOST 12:00 O'CLOCK.

MS. NAJERA: IT'S CONVENIENT FOR EVERYBODY TO DO THIS NOW.

THE COURT: I THINK EVERYONE IS HERE.

WHY DON'T WE JUST DO THIS NOW, THEN, AND INSTRUCT RENEE TO LOCK THE COURTROOM.

AND YOU CAN ASK MISS BAKER IF SHE WANTS HER ATTORNEY IN SO WE DON'T LOCK HIM OUT IN THE HALL.

(SHORT PAUSE.)

THE COURT: WE ARE ON THE RECORD TO HEAR PROCEEDINGS IN CONNECTION WITH A MOTION TO QUASH A GRAND JURY SUBPOENA.

FOR THE RECORD, ALTHOUGH WE ARE IN THE COURTROOM, WE ARE NOT IN OPEN COURT IN THAT THE COURT HAS BEEN LOCKED.

IS THAT CORRECT?

THE CLERK: THAT IS CORRECT, YOUR HONOR.

THE COURT: THE PERSONS PRESENT PLEASE STATE YOUR [p. 36] NAMES FOR THE RECORD.

MR. WHITE: TERRY WHITE, DEPUTY DISTRICT ATTORNEY AND ALSO LEGAL ADVISOR FOR THE L.A. COUNTY GRAND JURY.

MR. CONN: DAVID CONN, DEPUTY DISTRICT ATTORNEY.

MR. GABBERT: PAUL GABBERT, G-A-B-B-E-R-T, COUNSEL FOR THE WITNESS TRACI BAKER.

THE COURT: AND MISS BAKER HAS REQUESTED THAT YOU BE PRESENT IN THIS PROCEEDING.

IS THAT CORRECT?

MR. GABBERT: THAT'S CORRECT.

THE COURT: MISS BAKER IS PRESENT AND ONE MORE PERSON PRESENT, GRAND JURY INVESTIGATOR DENNIS DUARTE.

MS. NAJERA: MAY MISS BAKER SIT AT COUNSEL TABLE?

THE COURT: SHE MAY.

ALL RIGHT.

I HAVE BEEN PROVIDED WITH A COPY OF A MOTION TO QUASH A GRAND JURY SUBPOENA AND FEDERAL AUTHORITIES IN SUPPORT OF THAT MOTION.

NEEDLESS TO SAY, I HAVEN'T READ THOSE.

LET ME ASK A COUPLE OF PRELIMINARY QUESTIONS TO SEE IF I UNDERSTAND EXACTLY WHAT THE ISSUE IS.

HAS MISS BAKER BEEN SUBPOENAED TO BOTH TESTIFY AND PRODUCE DOCUMENTS?

MR. CONN: THAT'S CORRECT.

THE COURT: HAS ANY TESTIMONY BEEN TAKEN?

MR. CONN: YOUR HONOR, THE WITNESS TOOK THE STAND THIS MORNING BEFORE THE

GRAND JURY, WE ASKED A COUPLE OF QUESTIONS OF HER AND SHE INVOKED HER FIFTH AMENDMENT [p. 37] PRIVILEGE TO BOTH OF THOSE QUESTIONS.

WE WERE THEN BEGINNING THE PROCESS OF ASKING HER WHETHER SHE HAD PRODUCED THE DOCUMENTS THAT SHE WAS SUBPOENAED TO PRODUCE BEFORE THE GRAND JURY; AND, ONCE AGAIN, SHE WAS INVOKING HER FIFTH AMENDMENT PRIVILEGE AS TO THAT.

SO WE WERE NOT ABLE TO ELICIT FROM HER THE FACT THAT SHE HAS FAILED TO PRODUCE DOCUMENTS.

THE COURT: ALL RIGHT.

ALTHOUGH THERE HAS BEEN A REQUEST TO TESTIFY AND AN INVOCATION OF THE FIFTH AMENDMENT, I DON'T THINK THAT ISSUE IS BEFORE THE COURT.

IT SEEMS TO ME THAT ALL IS AT ISSUE HERE IS THE DEFENDANT'S MOTION TO QUASH THE SUBPOENA WITH RESPECT TO DOCUMENTS AND AS TO WHETHER THERE IS A FIFTH AMENDMENT PRIVILEGE CONCERNING TESTIMONY.

THAT'S DOWN THE LINE, I GUESS, IN LATER LITIGATION.

MISS BAKER HAS BEEN ASKED TO PRODUCE LETTERS OR ANY CORRESPONDENCE THAT SHE HAS RECEIVED FROM LYLE MENENDEZ.

THE MOTION FILED BY THE DEFENSE CONTENDS THAT THE PRODUCTION OF THOSE DOCUMENTS, EVEN IF THE DOCUMENTS WERE NOT WRITTEN BY HER, ARGUABLY, MIGHT NOT BE INCRIMINATING.

THE CONTENTION OF THE DEFENSE IS THAT THE PRODUCTION OF THE DOCUMENTS IS AN INCRIMINATING ACT IN ITSELF AND IT'S PROTECTED BY THE FIFTH AMENDMENT AND THE [p. 38] DEFENDANT WOULD BE ENTITLED TO IMMUNITY BEFORE SHE WOULD BE REQUIRED TO PRODUCE THEM.

SO PERHAPS I SHOULD HEAR FROM THE PEOPLE IN RESPONSE TO THIS.

MR. CONN: THE AUTHORITY THAT WE WERE ABLE TO REFER TO AT THIS POINT IN TIME WAS UNITED STATES VS. DOE, UNITED STATES SUPREME COURT, 1984 CASE AT 104 SUPERIOR COURT 1237.

IT'S MY UNDERSTANDING FROM UNITED STATES VS. DOE THAT THE PRODUCTION OF RECORDS ITSELF IS REQUIRED.

IN THIS CASE INVOLVING A FEDERAL STATUTE CONCERNING USE IMMUNITY, THE SUPREME COURT HELD THAT THAT WITNESS MAY RECEIVE USE IMMUNITY AS TO THOSE DOCUMENTS THEMSELVES, BUT THE CONTENTS OF THE DOCUMENTS WERE NEVERTHELESS ADMISSIBLE AND WERE NOT PRIVILEGED AND HAD TO BE PRODUCED.

SO I THINK THAT THE FIRST ISSUE THAT MAY ARISE IS THE DIFFERENCE BETWEEN THE FEDERAL AUTHORITIES DEALING WITH A FEDERAL USE IMMUNITY STATUTE AND CALIFORNIA, WHICH DOES NOT HAVE A SIMILAR STATUTE.

WERE THIS TO BE ARGUED IN FEDERAL COURT, THE PRACTICAL EFFECT OF THIS, I BELIEVE, WOULD BE THAT THE WITNESS WOULD BE REQUIRED TO PRODUCE THE DOCUMENTS, BUT THAT THOSE DOCUMENTS WOULD NOT BE SOMETHING THAT WE COULD USE AGAINST THIS PARTICULAR WITNESS.

SO SHE WOULD NOT HAVE IMMUNITY FOR THE ENTIRE CRIME, BUT THOSE DOCUMENTS COULD NOT BE USED AGAINST HER IN A CRIMINAL PROCEEDING.

[p. 39] WE THEN TURN TO THE STATE LAW, WHERE WE HAVE NO SUCH USE IMMUNITY BY STATUTE AND WE NEED TO DETERMINE THE DISTINCTION TO BE DRAWN THERE.

MY OPINION, YOUR HONOR, IS, AT MOST, WE WOULD BE GUIDED BY THE SAME STANDARD; THAT IS, AT THE VERY MOST WE COULD NOT USE THOSE DOCUMENTS AGAINST THIS WITNESS IN A CRIMINAL PROCEEDING.

THE QUESTION IS WHETHER THAT STANDARD EVEN APPLIES UNDER THE STATE LAW.

BUT MY POSITION IS THAT, AT LEAST AT THIS POINT, THE WITNESS SHOULD BE ORDERED TO PRODUCE THE DOCUMENTS.

THERE IS A VALID SUBPOENA ORDERING HER TO PRODUCE THE DOCUMENTS, AND THE QUESTION OF WHAT USE CAN BE MADE OF THOSE DOCUMENTS IN THE FUTURE IS SOMETHING THAT THIS COURT OR SOME OTHER COURT CAN DETERMINE AT SUCH TIME THAT THE PEOPLE SEEK TO USE THOSE DOCUMENTS IN AN ACTION AGAINST HER.

THE COURT: I DON'T THINK THAT'S GOING TO PROVIDE MUCH COMFORT TO THE DEFENSE.

LET ME ASK YOU THIS:

ASSUMING THAT IN CALIFORNIA, WHERE WE HAVE TRANSACTIONAL IMMUNITY, ASSUMING THAT THAT APPLIED TO THIS CASE - AND I'M NOT SURE WHETHER THAT WOULD CREATE A DISTINCTION THAT MAKES MUCH DIFFERENCE IN THIS CASE IN TERMS OF THE EFFECT IT WOULD HAVE - ARE THE PEOPLE WILLING TO GRANT THIS WITNESS TRANSACTIONAL IMMUNITY IN EXCHANGE FOR THE PRODUCTION OF THE DOCUMENTS?

[p. 40] MR. CONN: NO, YOUR HONOR, WE ARE NOT.

IN FACT, THERE IS ANOTHER MATTER WHICH IS CLOSELY RELATED TO THE ONE WE ARE DISCUSSING.

IN FACT, IT'S SOMEWHAT INEXTRICABLE FROM THE MATTER WE ARE DISCUSSING, WHICH I SHOULD BRING TO THE COURT'S ATTENTION ALTHOUGH, SPECIFICALLY, I DON'T THINK THE MATTER IS PROBABLY REALLY BEFORE THE COURT.

AND THAT IS THIS:

AFTER I HAD AN OPPORTUNITY TO REVIEW THE AUTHORITIES THIS WEEKEND CONCERNING THIS MATTER - WELL, I SHOULD POINT OUT ON FRIDAY, YOUR HONOR, WE OBTAINED A SEARCH WARRANT TO SEARCH THE WITNESS' HOME.

THE DOCUMENTS THAT WE ARE SEEKING ARE NOT THE DOCUMENTS THAT ARE NORMALLY SUBJECT ONLY TO A GRAND JURY SUBPOENA, SUCH AS THE DOCUMENTS THAT WERE INVOLVED IN UNITED STATES VS. DOE.

WE ARE SEEKING DOCUMENTS WHICH ARE CLEARLY INCRIMINATING OR EVIDENCE OF A CRIME. AND, AS SUCH, THEY ARE SUBJECT TO A SEARCH WARRANT AS WELL AS A GRAND JURY SUBPOENA.

SO LAST FRIDAY WE OBTAINED A SEARCH WARRANT FROM JUDGE POUNDERS AND WE WENT TO THE HOME OF THE WITNESS AND WE SEARCHED HER HOME.

WE DID NOT FIND THE DOCUMENTS.

SHE DID INDICATE DURING THE SEARCH THAT THE DOCUMENTS WERE TURNED OVER TO HER ATTORNEY, MR. GABBERT.

SHE WAS, OF COURSE, STILL ORDERED TO APPEAR BEFORE THE GRAND JURY TODAY AND PRODUCE THOSE DOCUMENTS.

[p. 41] WHAT WE DECIDED TO DO, SINCE THESE WERE DOCUMENTS THAT WERE SUBJECT TO A SEARCH WARRANT, WE DECIDED TO SEEK

ANOTHER SEARCH WARRANT TO RECOVER THE DOCUMENTS FROM COUNSEL.

IT IS OUR POSITION THAT THE MERE FACT THAT SHE HAS TURNED THE DOCUMENTS OVER TO HER COUNSEL DOES NOT CHANGE THE NATURE OF THE DOCUMENTS.

THEY WERE EVIDENCE OF A CRIME BEFORE AND THEY ARE EVIDENCE OF A CRIME NOW.

JUDGE POUNDERS AGREED. AND THIS MORNING JUDGE POUNDERS ISSUED A SEARCH WARRANT FOR THE DOCUMENTS.

NOW, THE ORIGINAL DRAFT OF THE SEARCH WARRANT THAT I HAD DRAFTED THIS MORNING IDENTIFIED THREE LOCATIONS TO BE SEARCHED.

ONE WAS THE LAW OFFICE OF MR. GABBERT, THE SECOND LOCATION WAS HIS PERSON AND BRIEFCASE AND THE THIRD WAS THE PERSON OF TRACI BAKER.

AS THAT WAS BEING PREPARED FOR JUDGE POUNDERS' SIGNATURE, I SAW MR. GABBERT IN THE HALLWAY AND I INQUIRED OF HIM WHETHER HE HAD BROUGHT THE DOCUMENTS WITH HIM.

HE INDICATED TO ME THAT HE HAD, IN FACT, BROUGHT THE DOCUMENTS WITH HIM.

THAT BEING THE CASE, I DECIDED NOT TO MAKE THE SEARCH WARRANTS ANY BROADER THAN NECESSARY, SO I AMENDED THE WARRANTS TO INCLUDE ONLY THE PERSON OF MR. GABBERT AND THE PERSON OF TRACI BAKER.

THAT IS, IN FACT, THE SEARCH WARRANT THAT WE PRESENTED TO JUDGE POUNDERS; AND, ONCE AGAIN, HE SIGNED [p. 42] THAT SEARCH WARRANT TODAY.

FOLLOWING THE ISSUANCE OF THAT SEARCH WARRANT, WE BROUGHT A SPECIAL MASTER AND REQUIRED MR. GABBERT TO OPEN HIS BRIEFCASE AND REVEAL THE CONTENTS OF HIS BRIEFCASE FIRST TO THE SPECIAL MASTER AND THEN TO THE INVESTIGATING OFFICER, WHICH HE DID.

AFTER IT WAS SHOWN AND THE DOCUMENTS WERE STILL NOT PRODUCED, I INQUIRED OF COUNSEL, WAS IT NOT THE CASE THAT HE HAD TOLD ME THIS VERY MORNING THAT HE HAD THE DOCUMENTS THAT WE WERE SEEKING ON HIS PERSON.

HE SUGGESTED THAT IT WAS A MISUNDERSTANDING ON MY PART; THAT HE NEVER CLAIMED THAT THE DOCUMENTS WERE ON HIS PERSON.

AT THIS POINT, WHAT WE DID WAS WE ONCE AGAIN REWROTE THE SEARCH WARRANT, BROUGHT IT TO JUDGE POUNDERS AND IT'S MY UNDERSTANDING THAT JUDGE POUNDERS HAS NOW SIGNED THAT SEARCH WARRANT.

SO THE DOCUMENTS WE ARE SEEKING IS PROPERLY SUBJECT TO SEIZURE PURSUANT TO A SEARCH WARRANT, AND WE INTEND AT THIS TIME TO GO OUT TO COUNSEL'S OFFICE AND SEE THE DOCUMENTS AT HIS OFFICE.

AS I SAID, PROPERLY SPEAKING, THAT IS NOT THE ISSUE BEFORE THE COURT.

THE ISSUE BEFORE THE COURT IS THE CONTEMPT, AND I WOULD ASK THAT THE COURT EITHER FIND HER IN CONTEMPT AT THIS TIME OR THE COURT CAN HOLD THAT RULING IN ABEYANCE UNTIL WE HAVE HAD AN OPPORTUNITY TO GO TO COUNSEL'S OFFICE AND GET THE DOCUMENTS.

[p. 43] AND ONCE WE HAVE THOSE DOCUMENTS IN OUR POSSESSION, WE HAVE NO INTEREST IN HOLDING THIS WITNESS IN CONTEMPT ANY LONGER.

THE COURT: ALL RIGHT.

MR. GABBERT?

MS. NAJERA: SOME, PERHAPS MOST, OF WHAT COUNSEL HAS SAID APPEARS TO BE ACCURATE, ALTHOUGH I DON'T THINK THE DOE CASE IS CONTROLLING.

MOVING BACK A DAY, TO GIVE THE COURT THE PROSPECTIVE OF WHY WE ARE HERE AND WHY WE ARE PURSUING SIMULTANEOUSLY TWO LEGAL AVENUES WHICH MAY OR MAY NOT BE AN ABUSE OF THE GRAND JURY PROCESS:

I MADE ARRANGEMENTS WITH COUNSEL TO HAVE MISS BAKER SERVED IN MY OFFICE ON THE AFTERNOON OF LAST THURSDAY SO SHE COULD RECEIVE THE SUBPOENA TO ATTEND THE GRAND JURY ON MONDAY.

MR. ZOELLER GOT THERE IN THE AFTERNOON AND SERVED HER.

WHEN I LOOKED AT THE SUBPOENA, THE SUBPOENA ASKED HER TO PRODUCE DOCUMENTS - AND I'M PARAPHRASING; I'M NOT READING OFF THE DOCUMENT RIGHT NOW - THAT SAID, "ALL CORRESPONDENCE OR ANY CORRESPONDENCE FROM LYLE MENENDEZ."

ALTHOUGH I ONLY KNOW THIS FROM WHAT I HAVE READ IN THE PAPER, SORT OF, IT APPEARS THAT THERE WAS A LETTER THAT SOMEONE GOT TO DOMINIC DUNN THAT PURPORTS TO BE FROM LYLE MENENDEZ AND IS WRITTEN TO A TRACI.

AND IT DISCUSSES - APPEARS TO DISCUSS PORTIONS OF HER TESTIMONY AT THE PREVIOUS TRIAL.

[p. 44] I WAS PROVIDED WITH A COPY, A POOR PHOTOSTAT OF THAT COPY OF THAT DOCUMENT BY A SOURCE OTHER THAN MY CLIENT, WHICH I PROVIDED TO THE SPECIAL MASTER AND COUNSEL WHEN THE WARRANT WAS EXECUTED TODAY.

WHEN I GOT THE SUBPOENA, I DID SOME RESEARCH.

I CALLED MR. CONN ON THE FOLLOWING MORNING AND I SAID, "I BELIEVE THE ACT OF PRODUCTION IS TESTIMONIAL AND COMPELLED AND PROTECTED BY THE FIFTH AMENDMENT, AND I'M GOING TO BRING A MOTION TO QUASH THE SUBPOENA AS TO THAT PORTION."

AND I SAID, "SHALL WE CONTINUE THE HEARING SO THERE WILL BE TIME FOR THIS?"

AND HE SAID, "NO."

I CALLED HIM BACK AND SAID, "WELL, TO GET THIS HEARD BEFORE MONDAY" - BECAUSE IT WAS NOW FRIDAY - "I NEED AN APPLICATION FOR AN ORDER SHORTENING TIME THAT I WILL BRING INTO DEPARTMENT 100.

"I ASSUME YOU WILL OPPOSE IT," OR ASKED HIM IF HE OPPOSED IT.

AND HE SAID ~~HE~~ OPPOSED IT.

I HAD THE DOCUMENTS PREPARED, WHICH ARE NOW BEFORE YOU AND I SENT THEM DOWN TO DEPARTMENT 100 THAT AFTERNOON. AND, UNBEKNOWNST TO ME, THEY WERE GETTING A SEARCH WARRANT, APPARENTLY.

THERE WAS NOBODY IN DEPARTMENT 100; THEY WOULDN'T FILE THE DOCUMENTS.

I DID A LITTLE SHOPPING OVER THE PHONE, MY MOBILE PHONE, TRYING TO FIND A JUDGE.

[p. 45] I TALKED TO THE CRIMINAL COURT'S COORDINATOR, MR. IVERSON.

HE FOUND ME JUDGE BASCUE.

I HAD MY RUNNER SUBMIT THE APPLICATION, FEDERAL AUTHORITIES AND MOTION BEFORE HIM, ASKING HIM TO SIGN THE ORDER SHORTENING TIME SO THIS MATTER COULD PROCEED IN AN ORDERLY WAY WITH EACH SIDE HAVING AN OPPORTUNITY TO ADDRESS THE ISSUE SO WE WOULDN'T HAVE A CONTEMPT PROCEEDING AND SO THAT - IT DIDN'T DAWN ON ME, I HAVE TO SAY.

IT WAS AN EXAMPLE OF A LACK OF FORESIGHT ON MY PART TO THINK THEY WOULD DO BOTH THINGS SIMULTANEOUSLY.

I THINK IT'S INAPPROPRIATE, BUT I THINK IT'S INAPPROPRIATE TO ARGUE IT BECAUSE I DIDN'T BRIEF IT.

JUDGE BASCUE DENIED THE EX PARTE APPLICATION FOR THE ORDER SHORTENING TIME.

I HAVE A COPY OF WHAT HE DID THAT I CAN PRESENT TO YOU SO YOU CAN SEE HIS REASON.

I PREVIOUSLY SHOWED IT TO COUNSEL THIS MORNING, WHEN COUNSEL MADE THE COMMENT TO THE EFFECT ABOUT BRINGING PAPERS, BECAUSE I HAD A VERY THICK FILE.

I THOUGHT HE WAS REFERRING TO THE MOTIONS AND THE DOCUMENTS THAT I TOLD HIM I WAS BRINGING ON FRIDAY WHICH I COULDN'T GET ANYBODY TO FILE.

NEVER IN MY WILDEST DREAMS DID I THINK HE THOUGHT I WAS BRINGING DOCUMENTS WHICH MAY OR MAY NOT EXIST TO THE GRAND JURY, THEREBY WAIVING THE ATTORNEY-CLIENT PRIVILEGE AND RENDERING MOOT THE FIFTH AMENDMENT OBJECTION.

[p. 46] I SUBMIT TO YOU, ALTHOUGH I DON'T THINK I HAVE HAD THE PLEASURE OF APPEARING BEFORE YOU BEFORE, THAT THAT'S NOT SOMETHING I WOULD DO, BECAUSE IT MAKES NO SENSE.

SO THEY THEN PROCEEDED TO TAKE MY CLIENT INTO THE GRAND JURY, AND I WENT WITH THE SPECIAL MASTER TO BE SEARCHED, WHEREUPON I PRODUCED THE TWO-PAGE COPY OF WHAT PURPORTS TO BE THE LETTER FROM LYLE MENENDEZ TO MISS BAKER.

THEN COUNSEL RELATED THE SUBSEQUENT SEARCH BY MR. ZOELLER AS WELL.

I WAS THEN FACED WITH THE PROBLEM OF HAVING MY CLIENT BE QUESTIONED ABOUT WHETHER SHE HAD PRODUCED DOCUMENTS, WHICH AN ANSWER TO WOULD ADMIT THEIR EXISTENCE, WHICH WAS ONE OF THE GROUNDS FOR BRINGING THE MOTION.

IT WOULD ALSO ACKNOWLEDGE HER CUSTODY AND CONTROL, WHICH WAS A SECOND GROUND FOR BRINGING THE MOTION UNDER THE ACT OF THE PRODUCTION DOCTRINE, AND IT COULD AUTHENTICATE THE DOCUMENTS, WHICH WAS THE THIRD GROUND.

SO, IN ANSWER TO A QUESTION, IT WOULD CONSTITUTE A WAIVER, PROBABLY, OF THE - CERTAINLY OF THE FIFTH AMENDMENT PRIVILEGE AND, IF APPLICABLE, THE ATTORNEY-CLIENT PRIVILEGE.

SO THE ONLY THING I COULD TELL MISS BAKER TO DO UNDER THE CIRCUMSTANCES CREATED EXCLUSIVELY [SIC] BY THE PEOPLE AT THE OTHER END OF THE TABLE WAS TO ADVISE HER TO TAKE THE FIFTH AMENDMENT, WHICH I DID.

NOW WE'RE BEFORE YOU, AND PROBABLY THEY ARE [p. 47] SEARCHING MY OFFICE.

THE COURT: DO YOU WANT TO RESPOND, MR. CONN?

MR. CONN: YES.

AS I SAID, AS FAR AS PROCEEDING BOTH WAYS SIMULTANEOUSLY, THAT IS, THE WITNESS WAS ORDERED TO APPEAR BEFORE THE GRAND JURY AND TO PRODUCE THE DOCUMENTS AND, AT THE SAME TIME, WE DID OBTAIN A SEARCH WARRANT.

THIS WAS SOMETHING THAT WE FULLY BRIEFED JUDGE POUNDERS ON, SO JUDGE POUNDERS WAS AWARE OF THE FACT THAT THERE WAS AN ONGOING GRAND JURY HEARING AT THE TIME HE ISSUED THE SEARCH WARRANT.

AND I AGREE, THERE IS AN INVESTIGATING OFFICER AT THIS TIME EN ROUTE TO SEARCH HIS OFFICE.

SO I THINK, PERHAPS, THE SIMPLEST SOLUTION WOULD BE THE COURT CAN DELAY OR SUSPEND ANY RULING ON THIS MATTER UNTIL THE OFFICER HAS HAD TIME TO RECOVER THE DOCUMENTS FROM THE SANTA MONICA OFFICE OF COUNSEL IF HE DOES, IN FACT, RECOVER THE DOCUMENTS.

AND I THINK THIS ISSUE WILL BE MOOT BECAUSE, AS I SAID, WE ARE NOT ASKING THAT THE WITNESS BE HELD IN CONTEMPT IF WE DO, IN FACT, GET THE DOCUMENTS.

I UNDERSTAND SHE TURNED THOSE OVER TO HER ATTORNEY AND WAS ACTING UNDER ADVISE OF COUNSEL.

IF WE DO NOT RECOVER THE DOCUMENTS, THEN I THINK WE WILL BE FACED ONCE AGAIN WITH THE ISSUE OF CONTEMPT.

MR. GABBERT: MAY I ASK TWO POINTS?

FIRST OF ALL, AT THE TIME MY CLIENT PURPORTEDLY [p. 48] MADE THE STATEMENT THAT SHE HAD TURNED THE DOCUMENTS OVER TO HER COUNSEL, SHE WAS KNOWN TO BE REPRESENTED BY COUNSEL.

MR. ZOELLER KNEW THAT; BOTH DEPUTY DISTRICT ATTORNEYS KNEW THAT.

THEY KNEW BECAUSE THEY HAD SOUGHT MEETINGS WITH MY CLIENT, THOUGH THEY WERE NOT GOING TO BE TALKING TO HER ABSENT A GRANT OF IMMUNITY.

WHEN THEY EXECUTED THE WARRANT, THEY PROCEEDED TO QUESTION MY CLIENT IN A SITUATION THAT IF IT IS NOT LITERALLY CUSTODIAL, CERTAINLY IT HAS MANY OF THE TRAPPINGS.

BECAUSE I THINK WHEN YOU HAVE TWO DEPUTIES DISTRICT ATTORNEY AND TWO POLICE OFFICERS IN YOUR BEDROOM ON A FRIDAY EVENING, THAT'S A FAIRLY COERCIVE CIRCUMSTANCE. AND I DON'T KNOW THAT ANYONE WOULD FEEL FREE TO LEAVE.

NOW, I HAVEN'T BRIEFED THE ISSUE OF WHETHER THE RIGHT TO COUNSEL ATTACHED, BECAUSE IT IS A PRE-INDICTMENT SITUATION. AND THE FEDERAL RULE IS NO EXCEPTION WHEN IT DOES.

I HAVEN'T LOOKED AT THE STATE RULE ON IT, BUT IT'S CLEAR TO ME THAT THERE SHOULD HAVE BEEN NO QUESTIONING OF MY CLIENT.

THEY HAD BEEN TOLD NOT TO DO THAT, AND CERTAINLY WITH RESPECT TO THE DISCIPLINARY RULES OF THE STATE BAR, THE COMMUNICATION WITH A REPRESENTED PARTY IS FORBIDDEN.

[p. 49] SO IF SHE MADE THOSE STATEMENTS, I CLEARLY DON'T THINK THEY ARE VOLUNTARY AND I DON'T THINK THEY WOULD CONSTITUTE A WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE, AND I DON'T THINK THEY SHOULD CONSTITUTE ANY TYPE OF ADMISSION ON HER BEHALF BECAUSE OF THE CONTEXT IN WHICH THEY WERE MADE.

ALSO, IF THE COURT DOES WHAT COUNSEL SUGGESTS, YOU WILL BE SAYING, IN EFFECT, ALTHOUGH I DON'T KNOW THAT YOU WOULD AGREE, DE JURE, BUT DE FACTO, THAT EVERYTHING THEY HAVE DONE IS JUST FINE AND THIS IS HOW WE OUGHT TO CONDUCT OUR GRAND JURIES IN LOS ANGELES COUNTY.

AND IF YOU DON'T DO WHAT WE SAY, WE GET SEARCH WARRANTS FOR EVERYWHERE, AND THERE IS NO REASON TO HAVE COUNSEL, TO PREPARE MOTIONS, TO QUASH SUBPOENAS THAT

COULD BE INCRIMINATING IN THE ABSENCE OF IMMUNITY.

AND THE DUE PROCESS CONSIDERATIONS THAT ARE INHERENT IN THE PRE-INDICTMENT CONTEXT HAVE NO APPLICATION.

AND THE FACT THAT IN AN EX PARTE - IN ANOTHER EX PARTE PROCEEDING A PROSECUTOR HAS PERSUADED ANOTHER JUDGE OF THIS COURT THAT WHAT THE CONTENTS OF THE OBJECTS HE SEEKS TO FIND, THE EXISTENCE OF WHICH HE DOES NOT KNOW, ARE SUCH THAT HE CAN CIRCUMVENT THE DISPOSITION OF THIS MATTER IN A COURT OF LAW AND RESULT TO THE SEARCH WARRANT PROCESS BOTH TO MY CLIENT, AS TO MY PERSON, MY BRIEFCASE AND MY EFFECTS, MY OFFICE.

I SUBMIT TO YOU THAT I DON'T THINK THAT'S APPROPRIATE. I THINK WE SHOULD HAVE A RULING ON THIS ISSUE.

[p. 50] THE RULING MAY RENDER THE WHOLE MATTER MOOT, SO RATHER THAN DO NOTHING, AS COUNSEL WOULD HAVE-YOU DO, AND GIVE THE IMPRIMATUR OF APPROVAL OF THE PROCEDURE, I WOULD ASK THE COURT TO RULE ON THE ISSUES THAT I COULD IN GOOD FAITH - COULD NOT GET ANYONE TO FILE, MUCH LESS HEAR, BEFORE THE WHOLE SITUATION WAS CREATED.

THE COURT: WELL, AS FAR AS THE PROCEEDINGS THAT I'M HEARING ABOUT, WHILE THEY ARE UNUSUAL, I DON'T BELIEVE THERE IS ANYTHING IMPROPER THAT'S HAPPENING HERE.

BECAUSE I THINK JUDGE POUNDERS CERTAINLY COULD HAVE PROPERLY FOUND THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT THESE LETTERS, IF THEY EXIST, ARE EVIDENCE OF A CRIME COMMITTED BY LYLE MENENDEZ.

SO WE REALLY HAVE TWO SEPARATE PROCEEDINGS GOING.

I WILL STATE FOR THE RECORD, WHEN I CALLED THE ATTORNEY, THE GRAND JURY ADVISOR, INTO THE CHAMBERS ON RECORD, MY QUESTION TO HIM WAS, "IS THIS A GRAND JURY PROCEEDING SEEKING AN INDICTMENT AGAINST MISS BAKER?"

AND I WAS TOLD, "THIS IS A GRAND JURY INVESTIGATION AND NO INDICTMENT IS BEING SOUGHT NOW."

ON THE OTHER HAND, IT CERTAINLY APPEARS THAT AN INDICTMENT IS A POSSIBILITY AGAINST MISS BAKER BASED ON WHAT IS UNCOVERED BY THE GRAND JURY AND AS A RESULT OF THIS INVESTIGATION.

BUT CLEARLY THE PROSECUTION IS INTERESTED IN TWO SEPARATE THINGS:

ONE IS EVIDENCE AGAINST MR. MENENDEZ; AND, [p. 51] THE OTHER MAY BE EVIDENCE AGAINST MISS BAKER.

I'M PROBABLY NOT GOING TO SATISFY ANYBODY VERY MUCH BECAUSE I'M NOT PREPARED TO RULE ON THE FIFTH AMENDMENT ISSUE SIMPLY BECAUSE WHETHER PRODUCTION OF DOCUMENTS

IS THE INCRIMINATING EVENT, I HAVE NOT READ ANY OF THESE NICE FEDERAL CASES.

MY PRELIMINARY REACTION TO IT IS IT'S PROBABLY AN ISSUE THAT RAISES PRIVILEGE AND PROBABLY THE FIFTH AMENDMENT APPLIES AND THAT SHE WOULD BE ENTITLED TO A GRANT OF IMMUNITY BEFORE SHE COULD BE COMPELLED TO PRODUCE THESE DOCUMENTS.

I THINK THE PRODUCTION OF THE DOCUMENTS BY HER BOTH ACKNOWLEDGES THEIR RECEIPT BY HER.

THERE IS NO WAY SHE COULD COME INTO POSSESSION OF THESE LETTERS, I'M SURE, UNLESS LYLE WOULD HAVE MAILED THEM TO HER AND ALSO AUTHENTICATES THEM.

AND I THINK THAT'S INCRIMINATING.

THAT'S JUST MY THRESHOLD OPINION, AND I HAVE CHANGED MY MIND BEFORE WITH THE ASSISTANCE OF RESEARCH. BUT THAT'S WHERE I THINK WE ARE.

BUT THIS MAY BE ACADEMIC.

IF, IN FACT, THE DOCUMENTS ARE RECOVERED BY SEARCH WARRANT, THEN THE PEOPLE MAY HAVE NO FURTHER INTEREST IN EITHER TESTIMONY OR DOCUMENTS FROM MISS BAKER.

SO I'M GOING TO TAKE IT UNDER SUBMISSION TO GIVE ME AN OPPORTUNITY TO DO THE RESEARCH.

I THINK WHAT I'D BEST DO IS RESCHEDULE IT AND GIVE YOU A RETURN DATE RATHER THAN WAIT TO HEAR FROM YOU.

[p. 52] AND IF, IN FACT, IT WORKS OUT, YOU CAN LET ME KNOW AND WE CAN TAKE IT OFF CALENDAR.

WHAT DO YOU THINK, IN TERMS OF TIME?

WHEN DO YOU THINK YOU'LL KNOW WHETHER A SEARCH WARRANT PRODUCED THE INFORMATION YOU NEED?

MR. CONN: PERHAPS WEDNESDAY.

WE ARE GOING TO BE APPEARING ON THE SAME CASE IN ANOTHER COURT TOMORROW.

WE WOULD ASSUME BY WEDNESDAY WE WILL KNOW WHAT THE SEARCH WARRANT REVEALED.

THE COURT: MAYBE THE AFTERNOON WOULD BE EASIER FOR ME. THAT WOULD GIVE ME PLENTY OF TIME.

LET ME TRAIL THIS, THEN, TO WEDNESDAY, MARCH 14, AT 1:30.

MR. CONN: MISS NAJERA POINTED OUT - WOULD IT BE POSSIBLE TO DO IT ON THURSDAY?

IS THAT ALL RIGHT WITH EVERYBODY?

MR. GABBERT: THURSDAY AFTERNOON?

MR. CONN: OR MORNING, ACTUALLY.

MR. GABBERT: I CAN'T DO IT THURSDAY AFTERNOON.

I COINCIDENTALLY HAVE ANOTHER CLIENT BEFORE A FEDERAL GRAND JURY ON THURSDAY MORNING IN A TOTALLY UNRELATED MATTER.

THE COURT: THAT'S AN UNUSUAL SPECIALTY, BUT THERE YOU ARE.

IS THURSDAY MORNING ALL RIGHT?

MR. GABBERT: THURSDAY MORNING IS WHEN I HAVE TO BE THERE.

[p. 53] SO, FOR ME, IT WOULD HAVE TO BE THURSDAY AFTERNOON.

THE COURT: THAT'S FINE.

THURSDAY AT 1:30?

THE CLERK: MARCH 24.

THE COURT: I THOUGHT TODAY WAS THE 12TH.

I'M A LITTLE CONFUSED.

MARCH 24.

ALL RIGHT.

MISS BAKER, UNLESS YOUR ATTORNEY INSTRUCTS YOU OTHERWISE, COME BACK TO THIS COURT ON THURSDAY, MARCH 24, AT 1:30.

MR. WHITE: I WOULD ASK THE COURT TO ADMONISH COUNSEL THAT THE GRAND JURY PROCEEDING - AND THIS IS A GRAND JURY PROCEEDING - IS CONFIDENTIAL AND THAT HE IS LIABLE UNDER THE PENALTY OF PERJURY - EXCUSE ME -

UNDER CONTEMPT OF COURT IF HE REVEALS ANYTHING THAT OCCURED [SIC] DURING THIS HEARING OR IF HE DOES BEFORE THE GRAND JURY -

MR. GABBERT: I HAVE ONE QUESTION THAT'S NOT CLEAR IN MY MIND.

I HAD RICHARD HIRSCH AND HIS PARTNER COME DOWN BECAUSE IN NEARLY 17 YEARS I HAD NEVER BEEN THE SUBJECT OF A SEARCH WARRANT. AND I THOUGHT IT WOULD BE APPROPRIATE IF I WERE REPRESENTED BY COUNSEL.

SO I'M NOT CLEAR WHETHER I CAN COMMUNICATE WITH MY COUNSEL ABOUT WHAT WENT ON IN HERE TODAY.

IT WOULD SEEM TO ME I COULD.

THE COURT: IF THE PEOPLE DISAGREE, THEY CAN SAY SO.

[p. 54] I THINK YOU CAN COMMUNICATE WITH YOUR ATTORNEYS ABOUT ANYTHING CONCERNING THE SEARCH WARRANT BUT NOT ABOUT ANY GRAND JURY TESTIMONY THAT WAS REQUIRED OF YOUR CLIENT OR DOCUMENTS THAT WERE REQUIRED BY THE GRAND JURY.

BUT ANYTHING REGARDING YOU AND THE SEARCH, YOU ARE FREE TO TALK TO YOUR ATTORNEYS.

MR. GABBERT: THANK YOU.

THE COURT: DO YOU HAVE ANY PROBLEM WITH THAT?

MR. CONN: NO, YOUR HONOR.

MR. GABBERT: I HAVE ONE FURTHER REQUEST. I'M SURE IT WON'T BE A PROBLEM.

IF I CAN JUST GET THESE DOCUMENTS STAMPED FILED, I WOULD BE VERY HAPPY.

THE COURT: WE CAN MARK THEM "RECEIVED," BUT THERE IS NO CASE NUMBER AND THERE IS NO CASE IN WHICH TO FILE THEM.

BUT WE WILL INDICATE ON YOUR COPIES THAT THEY WERE RECEIVED BY THIS COURT TODAY.

MR. GABBERT: THANK YOU.

THE COURT: THANK YOU.

(THE PROCEEDINGS WERE CONCLUDED.)

DEPT 101

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Date: May 19, 1995

HONORABLE: J. STEPHEN CZULEGER JUDGE
E HOCKADAY Deputy Sheriff
H KIM Deputy Clerk
H THEISS Reporter

BH000656

People of the State of California
vs.

In Re: Grand Jury subpoena for
Tracy L. Baker (N/A)

(Parties and counsel checked if present)

Counsel for People

Deputy District Attorneys:

Assistant County Counsel: F BENNETT (X)

Counsel for Defendant:

Counsel for witness: V PODBERESKY, PVT (X)

Counsel for Petitioner: M LIGHTFOOT, PVT (X)

Paul Gabbert (N/A) M WIDDIFIELD, PVT (X)

NATURE OF PROCEEDINGS
PETITION FOR DISCLOSURE

Matter is called for hearing re petitioner Gabbert's petition for disclosure of Grand Jury transcript and related documents, etc.

Ms. Podberesky's request for the Court to make further inquiry to determine possible violation of Grand Jury secrecy rules is DENIED.

The Court finds that there has been a particularized need shown by the petitioner for the Grnad [sic] Jury material that outweighs any secrecy issues and makes the following orders:

Upon payment to the court reporter, counsel shall receive a copy of the transcript of the testimony of Tracy Baker before the Los Angeles County Gand [sic] Jury on March 21, 1994 and the transcript of the contempt proceeding relating to Tracy Baker conducted on March 21, 1994 before the Honorable Florence Marie Cooper.

County Counsel is to provide to the petitioner the Grand Jury Log reflecting all appearances by all witnesses concerning this investigation before the Grand Jury on March 21, 1994 and the minutes reflecting all appearances by Tracy Baker before the Grand Jury on March 21, 1994.

The petitioner, Paul Gabbert, may discuss any and all proceedings with his counsel at any time.

[Received 5/30/95 11 a m /s/RBL]

MINUTE ORDER

MINUTES ENTERED
5/19/95
COUNTY CLERK

THE GRAND JURY OF THE
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

IN RE GRAND JURY INVESTIGATION.) CASE NO.
) (NONE)
) (SECRET)

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) SS.

I, RICHARD B. COLBY, CSR, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1, 2 & 24 - 54, COMPRISES A FULL, TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS REPORTED BY ME ON MARCH 21, 1994 IN THE ABOVE-ENTITLED MATTER.

DATED THIS 31ST DAY OF MAY 1995

/s/ Richard Colby CSR 1080
OFFICIAL REPORTER

EXHIBIT 10

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPARTMENT NO. 101 HON. J. STEPHEN

HON. J. STEPHEN
CZULEGER, JUDGE

IN RE THE MATTER OF	)	CASE NO.
GRAND JURY	)	BH000656
SUBPOENA FOR TRACY L.)	
BAKER,)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
FRIDAY, MAY 19, 1995

APPEARANCES:

FOR THE RESPONDENT: DE WITT W. CLINTON
COUNTY COUNSEL
BY: FREDERICK R.
BENNETT,
ASSISTANT COUNTY
COUNSEL
648 HALL OF
ADMINISTRATION
500 WEST TEMPLE
STREET
LOS ANGELES,
CALIFORNIA 90012

FOR THE PETITIONER
PAUL L. GABBERT:

TALCOTT, LIGHTFOOT,
VANDEVELDE,
WOEHRLE & SADOWSKY
BY: MICHAEL J.
LIGHTFOOT AND
MELISSA
N. WIDDIFIELD
655 SOUTH HOPE
STREET, 13TH FLOOR
LOS ANGELES,
CALIFORNIA 90017

FOR THIRD PARTY
WITNESS, TRACY BAKER:

**HIRSCH, NASATIR &
PODBERESKY
BY: VICKI I.
PODBERESKY
2115 MAIN STREET
SANTA MONICA,
CALIFORNIA 90405**

**M. HELEN THEISS, CSR,
#2264
OFFICIAL COURT
REPORTER**

[p. 1] LOS ANGELES, CALIFORNIA,
FRIDAY, MAY 19, 1995
8:45 A. M.

DEPARTMENT NO. 101
HON. J. STEPHEN CZULEGER, JUDGE

APPEARANCES:

FREDERICK R. BENNETT, ASSISTANT COUNTY COUNSEL, FOR THE COUNTY OF LOS ANGELES, APPEARING FOR THE RESPONDENTS, DAVID CONN AND CAROL NAJERA; MICHAEL J. LIGHT-FOOT AND MELISSA N. WIDDIFIELD, ATTOR-NEYS AT LAW, APPEARING FOR PETITIONER,

PAUL L. GABBERT; VICKI I. PODBERESKY, ATTORNEY AT LAW, APPEARING ON BEHALF OF TRACY L. BAKER, THIRD PARTY WITNESS.

(M. HELEN THEISS, CSR #2264, OFFICIAL REPORTER.)

THE COURT: LET ME CALL THE CASE OF IN RE GRAND JURY SUBPOENA FOR TRACY L. BAKER.

COUNSEL, PLEASE MAKE YOUR APPEARANCES FOR THE RECORD.

MR. LIGHTFOOT: MICHAEL LIGHTFOOT AND MELISSA WIDDIFIELD APPEARING HERE ON BEHALF OF PAUL GABBERT.

MS. PODBERESKY: VICKI PODBERESKY APPEARING ON BEHALF OF TRACY BAKER.

MR. BENNETT: FREDERICK BENNETT, ASSISTANT COUNTY COUNSEL HERE AT THE REQUEST OF THE COURT.

THE COURT: MR. BENNETT THIS WAS A NOTICED MOTION ON FOR 8:30. I ASKED FOR PAPERS TO BE FILED LAST FRIDAY. WE NEVER HEARD ANYTHING FROM YOUR OFFICE. WE CALLED YOUR [p. 2] OFFICE ON MONDAY AND THEY SAID, "WE ARE NOT OPPOSING IT." MY CLERK ASKED, "HOW ARE WE SUPPOSED TO KNOW? WE HAVE TO HAVE SOMETHING IN WRITING." WE GOT SOMETHING ON TUESDAY. IT IS STILL A MOTION AND I HAD NOT EXCUSED COUNSEL FROM ATTENDING A NOTICED MOTION.

MR. BENNETT: OUR OFFICE REPRESENTS THE DISTRICT ATTORNEY AND THE DEFENDANTS IN THE UNDERLYING ACTION, THAT'S BEING HANDLED BY AN ATTORNEY IN OUR OFFICE BY THE NAME OF KEVIN BRAZILE. HE WAS INSTRUCTED TO FILE A STATEMENT OF NON OPPOSITION.

I MIGHT INDICATE THERE WAS SOME CONFUSION EARLY ON BECAUSE I RECEIVED SOME COMMUNICATIONS FROM MS. WIDDIFIELD, I GUESS, AND I WAS UNAWARE THAT OUR OFFICE WAS INVOLVED IN THE LITIGATION. SO THERE WAS INITIALLY SOME INVOLVEMENT ON OUR PART, BUT IT IS OUR OFFICE THAT IS HANDLING THIS MATTER THROUGH KEVIN BRAZILE. HE IS ASSIGNED TO THE UNDERLYING CASE. I AM TAKING NO - AS A RESULT WE ARE TAKING NO INDEPENDENT POSITION WITH REGARDS TO ANY OTHER PERSON.

THE COURT: ALL RIGHT.

WELL, I DON'T KNOW ABOUT THE OTHER PEOPLE. I HAD SOME QUESTIONS THOUGH. INITIALLY COUNTY COUNSEL TOOK THE POSITION, I THINK IT WAS YOUR LETTER, THAT THEY WOULD NOT TURN OVER THE GRAND JURY MATERIAL BECAUSE - YOUR LETTER OF APRIL 14, 1995 - BECAUSE IT WAS COVERED IN THE SECRECY RULES OF THE GRAND JURY

MR. BENNETT: WAS THAT THE REQUEST FOR THE BAILIFF LOGS, THAT LETTER, OR FOR A TRANSCRIPT?

[p. 3] MS. WIDDIFIELD: YOUR HONOR, IF I MIGHT.

THIS LETTER WAS A RESPONSE TO A SUBPOENA FOR THE GRAND JURY TRANSCRIPT.

MR. BENNETT: THAT WAS A SUBPOENA IN FEDERAL COURT.

THE COURT: CORRECT.

MR. BENNETT: AND WE FILED A STATEMENT THERE UNDER THE FEDERAL RULES THAT IT WOULD NOT BE PRODUCED. NOW, THAT WAS IN THE FEDERAL COURT, I BELIEVE.

THE COURT: CORRECT.

MR. BENNETT: NOW, A MOTION HAS BEEN MADE TO THE SUPERIOR COURT WHICH SUPERVISES THE GRAND JURY. I THINK THAT'S IN A DIFFERENCE [sic] STATURE, ITS A NARROWLY DRAWN MOTION FOR A TRANSCRIPT WHICH I BELIEVE GOES DIRECTLY TO THE CREDIBILITY OF A WITNESS. UNDER THE CIRCUMSTANCES OF THE MOTION WE HAVE NOT ASSERTED ANY GROUNDS TO OPPOSE THAT MOTION.

THE COURT: OKAY.

THE QUESTION I HAVE IS DOES THE COUNTY COUNSEL HAVE THE GRAND JURY TRANSCRIPT AND INFORMATION?

MR. BENNETT: IT REPRESENTS THE CLIENTS WHO HAVE KNOWLEDGE AND POSSESSION OF A COPY OF THAT TRANSCRIPT.

THE COURT: SO YOUR ANSWER IS, YES, THE COUNTY COUNSEL DOES HAVE A COPY OF THE TRANSCRIPT?

MR. BENNETT: IT REPRESENTS CLIENTS WHO HAVE POSSESSION OF IT AND KNOWLEDGE OF IT.

THE COURT: I UNDERSTAND THAT.

CAN YOU ANSWER MY QUESTION?

MR. BENNETT: I DON'T KNOW PERSONALLY THE ANSWER TO [p. 4] THAT QUESTION.

THE COURT: THE REASON I ASK IS AS YOU CITE IN THAT LETTER THE SECRET GRAND JURY, YOU KNOW THAT I SUPERVISE A LOT OF GRAND JURY MATERIAL MY QUESTION IS WHY DOES COUNTY COUNSEL IN CIVIL LITIGATION HAVE

WHICH SHOULD BE SECRET GRAND JURY MATERIAL?

MR. BENNETT: ONE, THE DISTRICT ATTORNEY CLEARLY HAS LAWFUL POSSESSION AND KNOWLEDGE. THEY ARE SUED AS DEFENDANTS WITH REGARDS TO THAT AND I DON'T KNOW HOW A CLIENT IGNORES KNOWLEDGE THAT THEY KNOW IN DEFENSE OF A MATTER AND THEIR ATTORNEY CERTAINLY KNOWS WHATEVER THEY KNOW.

THE COURT: I MIGHT AGREE WITH YOU EXCEPT THERE IS A QUESTION ABOUT WHETHER A DISTRICT ATTORNEY HAS THE AUTHORITY TO DISCLOSE WITHOUT COURT ORDER IN A CIVIL LITIGATION TO THE LAWYERS. THIS IS UNRELATED TO THE CRIMINAL MATTER. THIS IS NOT RELATED TO THE CRIMINAL CASE, GRAND JURY MATERIAL WHICH SHOULD BE SECRET, THAT'S THE QUESTION.

MR. BENNETT: INTERESTINGLY ENOUGH IN ALL OF THE STATUTES ON SECRECY THERE IS NO STATUTE THAT IS DIRECTLY RELATED TO WHAT A DISTRICT ATTORNEY MAY OR MAY NOT DISCLOSE.

THE COURT: ITS INTERESTING BUT IF YOU READ THERE IS TWO WAYS A TRANSCRIPT CAN BE DISCLOSED. EITHER 10 OR 20 DAYS AFTER AN INDICTMENT IS RETURNED IT CAN BE MADE AVAILABLE, IF THERE IS NO INDICTMENT THAT IS RETURNED THEN UPON APPLICATION TO THE COURT THE TRANSCRIPT CAN BE [p. 5] DISCLOSED EITHER TO A DEFENDANT IN A CRIMINAL CASE OR TO THE DISTRICT ATTORNEY, WHICH WOULD LEAD ONE TO BELIEVE THAT, AND THERE IS NO INDICTMENT RETURNED, I GATHER, FROM THIS INVESTIGATION, THAT ONE WOULD HAVE TO MAKE AN APPLICATION TO THE COURT TO DISCLOSE THE TRANSCRIPT.

MR. LIGHTFOOT: THE DISTRICT ATTORNEY IS PRESENT DURING THE PRESENTATION OF THAT TESTIMONY.

THE COURT: RIGHT.

MR. BENNETT: AND IN THAT PROCESS IS IN POSSESSION OF THE EXHIBITS, MATERIALS AND TRANSCRIPT, AND IS FREE TO USE IT OFFICIALLY. NOW, THEY CAN BE SUED, I PRESUME, WITH REGARDS TO WHAT THEY KNOW, THAT KNOWLEDGE, AND IN SEEKING LEGAL ADVICE OVER THEIR REPRESENTATION THEIR ATTORNEY, I THINK, IS IN THEIR SAME STEAD.

NOW, THERE IS NO CASE ON THAT, THERE IS NO ISSUE ON THAT, THERE IS NO STATUTE THAT SPECIFICALLY DEALS WITH THE DUTY OF A DISTRICT ATTORNEY IN THAT REGARD. AS A MATTER OF FACT, OUR OFFICE PROVIDES LEGAL ADVICE GENERALLY TO THE DISTRICT ATTORNEY AND THEY WOULD BE FREE TO SEEK OUR ADVICE CONCERNING PRESENTATION OF MATTERS TO THE GRAND JURY.

AS YOU KNOW WE HAVE A DUAL ROLE WITH REGARD TO THE GRAND JURY GENERALLY, WHICH IS THE GRAND JURY MAY SEEK THE ADVICE OF COUNSEL, OF THE DISTRICT ATTORNEY, AS TO ANY MATTER, NOT JUST THE ADVISOR BUT THE DISTRICT ATTORNEY OR ANY OF HIS DEPUTIES, AS TO ANY MATTER. AND I PRESUME IN SEEKING THAT ADVICE THEY ARE FREE TO DISCUSS WITH HIM THINGS ESSENTIAL TO SEEKING THAT ADVICE.

[p. 6] WE ARE FREE TO PROVIDE ADVICE ON CIVIL MATTERS TO A GRAND JURY. WE ARE NOT ENTITLED TO BE PRESENT BUT IN THAT RELATIONSHIP AND UNIQUE CIRCUMSTANCES OF THIS CASE WHERE, AS I UNDERSTAND IT, I AM NOT THE

ATTORNEY ASSIGNED THE DEFENSE OF THAT CASE, WHERE HIS CLIENTS HAVE KNOWLEDGE AND LAWFUL POSSESSION OF A MATTER OVER WHICH THEY ARE SUED IN SEEKING CONFIDENTIAL LEGAL ADVICE FROM THEIR COUNSEL. I THINK THAT THEY ARE FREE TO DISCUSS WHAT THEY KNOW, IF IT IS NECESSARY TO THAT PROPER ADVICE.

THE COURT: BUT DON'T YOU THINK IT WOULD BE SAFE TO SEEK AUTHORITY OF THE COURT?

MR. BENNETT: IF I WERE THE ATTORNEY HANDLING THAT CASE THAT'S WHAT I WOULD HAVE DONE.

THE COURT: LET'S PUT IT THIS WAY: IF UNDERSTAND THE FEDERAL RULES, WE ARE NOT - I AM SURE YOU ARE FAMILIAR WITH RULE 6E OF THE FEDERAL CRIMINAL RULES, YOUR CLIENT WOULD BE FACING A CONTEMPT OF COURT FOR DISCLOSING IT. THE PROBLEM IS A LOT OF THE GRAND JURY SECRECY RULES ON THE STATE SIDE ARE VAGUE AND SOMETIMES CONFUSING, BUT YOU RAISE THE ISSUE IN YOUR LETTER BACK TO COUNSEL THAT THERE ARE SECRECY RULES THAT YOU ARE GOING TO COMPLY WITH, BUT AS I UNDERSTOOD THE AFFIDAVIT YOU ARE SAYING THAT YOU ARE GOING TO BE USING THAT SAME MATERIAL IN THE COURSE OF A DEPOSITION WHICH WOULD, OF COURSE, BE DISCLOSING MATERIAL.

MR. BENNETT: I AM NOT INVOLVED WITH REPRESENTATION OF THOSE CLIENTS. I HAVE GOT TO TELL YOU AS A PRACTICAL [p. 7] MATTER THE ATTORNEY WHO IS THERE DOESN'T HAVE ANY EXPERTISE IN GRAND JURY MATTERS, AND QUITE FRANKLY HAD MS. WIDDIFIELD ADVISED ME THAT THAT CASE WAS BEING HANDLED BY OUR OFFICE I

COULD HAVE DEALT WITH IT IN A DIFFERENT MANNER. I AM NOT SAYING THAT SHE INTENTIONALLY DIDN'T SAY IT, SHE MAY HAVE ASSUMED THAT I KNEW THAT WHEN THAT MATTER FIRST CAME THERE.

I DID NOT KNOW THAT THIS MATTER RELATED TO SOMETHING OVER WHICH SOMEBODY IN OUR OFFICE HAD BEEN ADVISED, AND HAD THAT PERSON COME TO ME EARLY ON I WOULD HAVE, IF NOTHING ELSE OTHER THAN JUST COURTESY TO THE COURT AND THE PROCESS, HAVE ADVISED HIM TO PROCEED A LITTLE BIT DIFFERENTLY. BUT I WILL SAY THIS, IN MY OPINION THERE IS NOT A SINGLE BASIS FOR CONTEMPT IN THIS MATTER AND I HAVE A VERY GOOD UNDERSTANDING OF THE -

THE COURT: I AM NOT SUGGESTING THAT.

MR. BENNETT: NOR DO I BELIEVE THAT THAT DEPUTY HAS DONE ANYTHING WRONG. I BELIEVE HE HAS OPERATED PERFECTLY LAWFULLY.

THE COURT: MR. BENNETT, YOU MISS THE POINT OF MY QUESTION. I AM MAKING INQUIRIES BECAUSE JUST TWO WEEKS AGO I GOT A REQUEST FROM YOUR OFFICE TO HAVE GRAND JURY TRANSCRIPTS RELEASED, WHICH WAS AN APPROPRIATE REQUEST AND HANDLED APPROPRIATELY AND NOW I FIND A SITUATION WHERE YOUR OFFICE ALREADY HAS GRAND JURY TRANSCRIPTS, AND SINCE I SUPERVISE MUCH OF THE GRAND JURY STUFF AND I AM TRYING TO FIND OUT WHAT IS HAPPENING AND I AM FINDING OUT A GREAT DEAL THAT HAPPENED THAT FRIGHTENS ME. THAT IS WHY I [p. 8] WANTED COUNTY COUNSEL HERE TO FIND OUT WHAT IT IS, WHAT IS YOUR OFFICE'S POSITION, THAT'S WHY I AM MAKING THE INQUIRY. I HAVE NEVER SUGGESTED THAT CONTEMPT IS AN

AVAILABLE HERE BECAUSE THERE IS NO AUTHORITY FOR CONTEMPT HERE.

MR. BENNETT: I WOULD SAY THAT IN THE CIRCUMSTANCES WHERE THE DISTRICT ATTORNEYS HAVE LAWFUL KNOWLEDGE OF, LAWFUL POSSESSION OF A TRANSCRIPT OVER WHICH THEY HAVE BEEN SUED AND THEY SEEK LEGAL ADVICE THAT OUR OFFICE IS 100 PERCENT ENTITLED TO KNOW WHAT ALL OF THE DISTRICT ATTORNEY'S DO IN THAT RELATIONSHIP.

NOW, WHETHER THEY CAN USE IT AND SUBMIT THAT TRANSCRIPT IN EVIDENCE I THINK REQUIRES A COURT ORDER. MY UNDERSTANDING IS THAT HASN'T OCCURRED, THAT THAT TRANSCRIPT HASN'T BEEN RELEASED TO ANYBODY.

THE COURT: ALL RIGHT.

WELL, OTHER THAN YOUR OFFICE EVIDENTLY -

MR. BENNETT: I DON'T KNOW THAT, BUT I AM SURE WE HAVE KNOWLEDGE OF IT BECAUSE WE ARE REPRESENTING CLIENTS WHO HAVE KNOWLEDGE OF IT AND THOSE CLIENTS ARE ENTITLED TO FREE AND UNINHIBITED ADVICE FROM THEIR ATTORNEY OVER THINGS THAT THEY KNOW. NOW, I HAVE NOT BEEN PRIVY TO THOSE, I DON'T KNOW WHAT WAS INVOLVED IN THAT ATTORNEY-CLIENT RELATIONSHIP AND I AM SURE WE COULD NOT BE COMPELLED TO DISCLOSE IT IN ANY EVENT, BUT IF THAT HAPPENS I BELIEVE THEY WERE LAWFULLY ENTITLED TO DO THIS.

THE COURT: ALL RIGHT.

COUNSEL WISH TO BE HEARD?

[p. 9] MR. LIGHTFOOT: YOUR HONOR, LET ME JUST CLARIFY SOMETHING FACTUALLY. THERE

WAS A DEPOSITION THAT TOOK PLACE JUST A MATTER OF A WEEKS AGO WHERE MR. GABBERT'S THEN CLIENT, WHO IS NOW REPRESENTED BY MS. PODBERESKY, TRACY BAKER, WHO IS THE WITNESS BEFORE THE GRAND JURY, SHE WAS DEPOSED BY MR. BRAZILE AND BY A LAW FIRM IN TOWN THAT REPRESENTS THE THIRD AND FOURTH DEFENDANTS, THE FIRST AND SECOND DEFENDANTS BEING THE PROSECUTORS IN THIS CASE FROM THE D.A.'S OFFICE, THE THIRD AND FOURTH DEFENDANTS ARE POLICE OFFICERS WITH THE BEVERLY HILLS POLICE DEPARTMENT AND A LAWYER IN TOWN WHO HAD BEEN APPOINTED AS A SPECIAL MASTER. THAT LAW FIRM WAS PRESENT DURING THE DEPOSITION OF MS. BAKER.

SOMETIME AFTER THE DEPOSITION OF MS. BAKER OUR OFFICE TOOK THE DEPOSITION OF THE GRAND JURY BAILIFF, A GENTLEMAN BY THE NAME OF FOX, MS. WIDDIFIELD TOOK THAT DEPOSITION. WHEN MR. FOX RECEIVED THE DEPOSITION, THE DEPOSITION NOTICE, APPARENTLY HE CONTACTED THIS GENTLEMAN WHO WAS NOT THE ATTORNEY FROM COUNTY COUNSEL'S OFFICE REPRESENTING THE TWO DISTRICT ATTORNEYS.

MR. BENNETT THEN CALLED MS. WIDDIFIELD AND MS. WIDDIFIELD TOLD HIM AT THAT POINT THAT IN FACT MR. BRAZILE FROM HIS OFFICE WAS REPRESENTING THE DISTRICT ATTORNEYS. MR. BRAZILE THEN, WE UNDERSTAND, AFTER CONFERRING WITH MR. BENNETT THEN WENT TO THE DEPOSITION WITH MR. FOX AND AS THE COUNTY COUNSEL REPRESENTED MR. FOX. IT WAS A PERIOD OF WEEKS AFTER THOSE EVENTS THAT MS. BAKER'S DEPOSITION TOOK PLACE. SO, THE COUNTY [p. 10] COUNSEL'S OFFICE, BOTH MR. BENNETT AND MR. BRAZILE, WERE CERTAINLY AWARE

OF ALL THE CIRCUMSTANCES BEFORE THE DEPOSITION OF MS. BAKER TOOK PLACE.

DURING THE DEPOSITION OF MS. BAKER WE UNDERSTAND THAT THE MATERIALS WHICH WERE OTHERWISE WITHIN THE VEIL OF SECRECY OF THE GRAND JURY WERE USED AT LEAST BY MR. BRAZILE, PERHAPS BY THE LAWYER FROM THE PRIVATE FIRM REPRESENTING THE TWO OTHER DEFENDANTS IN THIS CASE. SO, IN FACT IN RESPONSE, DIRECT RESPONSE TO YOUR HONOR'S QUESTION PUT TO MR. BENNETT A FEW MINUTES AGO, "HAS IT BEEN USED?" WE BELIEVE THAT IT HAS BEEN USED.

AS A MATTER OF FACT, WE BELIEVE THAT IT WAS BECAUSE I WAS PRESENT DURING THE DEPOSITION OF MR. GABBERT AND THAT WAS A DEPOSITION THAT TOOK PLACE BEFORE THE DEPOSITION OF MR. FOX AND MS. BAKER, AND THAT MR. BRAZILE WAS USING THE GRAND JURY TRANSCRIPT TO FORMULATE QUESTIONS OF MR. GABBERT. SO, TO THE EXTENT THAT WE HAVE ANY KNOWLEDGE IT SEEMS CLEAR TO US THAT THERE HAS BEEN USE OF THE GRAND JURY TRANSCRIPT.

NOW, LET ME JUST PASS FROM THAT TO SOMETHING ELSE. ON THE DATE THAT THIS MATTER, THAT THESE EVENTS TOOK PLACE IN THIS BUILDING THE EVENTS FIRST OCCURRED OUTSIDE AND AROUND THE GRAND JURY ROOM ITSELF. OBVIOUSLY MR. GABBERT DID NOT GO INTO THE GRAND JURY ROOM, ALTHOUGH HIS CLIENT DID.

LATE IN THE MORNING MR. GABBERT WAS ADVISED THAT THE DISTRICT ATTORNEY'S OFFICE HAD CONTACTED THE DUTY COURT HERE AND THE MATTER HAD BEEN ASSIGNED TO, I BELIEVE [p. 11] AT THE TIME IT WAS DEPARTMENT 109 RIGHT

ACROSS THE HALL, JUDGE FLORENCE MARIE COOPER WAS SITTING IN THAT DEPARTMENT AT THE TIME.

JUDGE COOPER HELD A HEARING ON THE DISTRICT ATTORNEY'S MOTION THAT CERTAIN ACTION BE TAKEN WITH RESPECT TO MR. GABBERTIS CLIENT, MS. BAKER. THE COURTROOM WAS LOCKED, MR. GABBERT ACTUALLY, AS YOUR HONOR KNOWS FROM THE PAPERS, HE HAD EARLIER BEEN THE SUBJECT OF THE EXECUTION OF A SEARCH WARRANT. HE HAD IN THE INTERIM CALLED COUNSEL TO GIVE HIM ADVICE. THOSE LAWYERS EVENTUALLY CAME DOWN TO THE COURTHOUSE, THEY WERE NOT ALLOWED INTO THE COURTROOM DURING THE HEARING THAT TOOK PLACE BEFORE JUDGE COOPER, OBVIOUSLY, BECAUSE IT WAS A SECRET PROCEEDING THAT INVOLVED THE GRAND JURY.

AT THE CLOSE OF THOSE PROCEEDINGS BEFORE JUDGE COOPER, THIS IS WHAT MR. GABBERT HAS TOLD US, HE AS WELL AS EVERYBODY ELSE IN THE COURTROOM WERE ADVISED THAT THEY WERE NOT TO DISCLOSE CERTAIN PORTIONS OF THAT HEARING BECAUSE THOSE MATTERS INVOLVED WHAT HAD HAPPENED INSIDE THE GRAND JURY ROOM AND MR. GABBERT -

THE COURT: WAS THAT AS A RESULT OF JUDGE COOPER'S ORDER OR BY DIRECTION OF THE GRAND JURY FOREPERSON.

MR. LIGHTFOOT: I UNDERSTAND IT WAS JUDGE COOPER THAT ORDERED THAT. WE HAVEN'T SEEN, I DON'T EVEN KNOW IF THERE IS A TRANSCRIPT OF THOSE PROCEEDINGS THAT EXISTS, BUT WE CERTAINLY HAVE NOT SEEN IT. MR. GABBERT HAS BEEN VERY CAREFUL WITH US, AS HIS LAWYERS, NOT TO SAY THINGS TO US THAT WOULD BE

IN VIOLATION OF THE ORDER THAT WAS ISSUED [p. 12] BY JUDGE COOPER.

THE COURT: THIS IS ONE OF THE OTHER PROBLEMS THAT I HAVE SEEN OVER THE LAST YEAR OR SO, PEOPLE GIVE ORDERS WITHOUT A WHOLE LOT OF AUTHORITY AS REGARDS THE GRAND JURY, OR PROFESSES TO HAVE AUTHORITY FOR THINGS WHEN IN FACT DOESN'T. FOR EXAMPLE, IT IS STANDARD PRACTICE FOR THE DISTRICT ATTORNEY'S OFFICE TO INSTRUCT WITNESSES THAT THEY ARE NOT TO DISCLOSE ANYTHING. I HAVE ASKED OVER THE LAST YEAR FOR SOMEONE TO GIVE ME ANY AUTHORITY FOR THAT.

MR. LIGHTFOOT: THERE IS NOTHING -

MR. BENNETT: THERE IS AN ATTORNEY GENERAL OPINION, YOUR HONOR, I WILL SAY -

THE COURT: HAVE YOU GOT A COPY OF IT? BECAUSE I HAVE BEEN TELLING THE DISTRICT ATTORNEY'S OFFICE FOR THE BETTER PART OF A YEAR, "GIVE ME SOME AUTHORITY," AND NOT A SINGLE PERSON HAS EVER BEEN ABLE TO FIND ANY AUTHORITY.

MR. BENNETT: THERE IS A PUBLISHED, WELL KNOWN OPINION THAT THE ATTORNEY GENERAL'S OFFICE HAS. I WILL BE PLEASED TO GET YOU ONE.

I WILL SAY THIS, I THINK THE REASONING OF THAT OPINION IS A LITTLE BIT SUSPECT BUT IN ESSENCE THE QUESTION IS, THERE IT SAYS, "AND DIRECTION FROM THE FOREMAN NOT FROM THE DISTRICT ATTORNEY THAT WITNESSES NOT DISCLOSE." THAT HAS BEEN CONSTRUED AS A JUDICIAL ORDER THAT IS ENFORCEABLE BY CONTEMPT BY THE ATTORNEY GENERAL'S OFFICE.

I MUST SAY IF I WERE TO WRITE THE OPINION I THINK I WOULD REACH A DIFFERENT RESULT. BUT IT HAS BEEN [p. 13] IN EXISTENCE A LONG TIME, IT HAS BEEN RELIED UPON JUDICIALLY AND APPARENTLY ACCEPTED AS THE RULE, BUT I WILL BE PLEASED TO GET YOU -

THE COURT: I WOULD APPRECIATE THAT. BUT I CAN TELL YOU NO ONE IN THE DISTRICT ATTORNEY'S OFFICE, WE ARE TALKING ABOUT, I SUPPOSE, SOME OF THEIR STELLAR LIGHTS THAT WORK IN THE SIMPSON CASE HAVE YET BEEN UNABLE TO TELL ME WHAT THE AUTHORITY IS, AND I HAVE LOOKED AT EVERY SINGLE GRAND JURY CASE UNDER STATE LAW AND I CAN'T FIND ANY AUTHORITY.

AS WE KNOW AN ATTORNEY GENERAL OPINION MAY BE INTERESTING BUT CERTAINLY IS NOT BINDING, BUT THE FACT THAT SOMEONE SAYS SOMETHING TENDS TO CAUSE OTHER PEOPLE TO DO THINGS AND THE FACT THAT PEOPLE DO THINGS DOES NOT NECESSARILY MEAN IT IS CREDIBLE.

MR. BENNETT: IF ANYBODY HAD ASKED ME I CERTAINLY WOULD HAVE PROVIDED THAT TO YOU, AND LIKE I SAY IT IS WELL-KNOWN IN THE FIELD AND I WOULD GUESS A DISTRICT ATTORNEY TRIAL LAWYER MIGHT WELL NOT KNOW IT BUT CERTAINLY MR. WHITE, WHO ADVISES THE GRAND JURY, IS AWARE OF THAT OPINION.

THE COURT: NO.

MR. BENNETT: MAYBE THAT'S WHY OUR OFFICE GETS PAID A LITTLE MORE. I DON'T KNOW.

THE COURT: I CAN TELL YOU OTHER FORMER DISTRICT ATTORNEYS WHO ARE BENCH OFFICERS HAVE NO IDEA AND SUPERVISORS OF

DISTRICT ATTORNEYS HAVE NO IDEA, SO WHEN YOU SAY WELL-KNOWN MAYBE IT IS WELL-KNOWN IN CERTAIN [p. 14] QUARTERS BUT -

MR. BENNETT: IT IS IN THE ANNOTATED CODES. I DON'T KNOW HOW A PERSON CAN MISS IT, ITS THERE.

MR. LIGHTFOOT: I MIGHT CONCLUDE MY REMARKS BY SAYING I WAS GOING TO END BY INDICATING THAT OUR OFFICE HAS HAD, WE HAVE MADE SEVERAL ATTEMPTS IN THE PAST FEW YEARS TO GET COUNTY GRAND JURY TRANSCRIPTS AND I REMEMBER ONE IN PARTICULAR WHERE I WAS IN BATTLE WITH MR. BENNETT QUITE COINCIDENTALLY BEFORE JUDGE COOPER AND THE COUNTY TOOK THIS VIGOROUS POSITION THAT NOTHING WITHIN THE GRAND JURY CONFINES COULD BE DISCLOSED OUTSIDE THE INDIVIDUALS WHO WERE WORKING WITH THAT PARTICULAR INVESTIGATION.

SO IT STRIKES ME AT LEAST UNUSUAL THAT IN THIS CASE THEY SEEM TO BE BACKING OFF UNDER PECULIAR CIRCUMSTANCES BECAUSE WHEN MS. BAKER'S DEPOSITION WAS ABOUT TO BE TAKEN AND MS. PODBERESKY MENTIONED THIS, BUT IN A CAPSULE, SHE TRIED AS BEST SHE COULD TO GET THE COUNTY COUNSEL TO PUT THE DEPOSITION OVER SO THAT WE COULD PURSUE A MOTION IN FRONT OF THIS COURT TO HAVE IT RELEASED FOR THE PURPOSES OF USE IN THE DEPOSITION AND MR. BRAZILE WOULD NOT PERMIT THAT AND THAT DEPOSITION - WE WENT OVER TO FEDERAL COURT AND SHE SOUGHT A STAY, SHE DIDN'T GET IT, THE DEPOSITION TOOK PLACE. THEY USED THE TRANSCRIPT IN PUTTING QUESTIONS TO MS. PODBERESKY' CLIENT AND MS. PODBERESKY AND MS.

WIDDIFIELD SAT THERE WITHOUT THE BENEFIT OF THE SAME DOCUMENTS.

SO, I THINK THE - WHAT WE SHOULD DO IS BECAUSE I THINK THAT MR. BENNETT IS ABSOLUTELY RIGHT, HE [p. 15] DOESN'T KNOW ANYTHING ABOUT THIS BECAUSE HE HASN'T BEEN INVOLVED IN THE CASE BUT MR. BRAZILE DOES AND THE LAWYERS WHO HAVE REPRESENTED MR. OPPENHEIM AND OFFICER ZOELLER THEY HAVE KNOWLEDGE AND I THINK WE SHOULD SET THIS DOWN FOR A HEARING AND THE COURT CAN INQUIRE OF THEM - IF I MAY FINISH FOR A SECOND, MR. BENNETT - THE COURT MAY INQUIRE OF THEM WHAT THE FACTUAL BACKGROUND OF THIS IS.

THE COURT: WELL, I AM GOING TO DENY THAT REQUEST.

THIS IS NOT AN OPPOSED MOTION I HAVE NO INTEREST IN CREATING ANY ADDITIONAL WORK. MY INTEREST IN BRINGING MR. BENNETT OVER IS TO GET ADDITIONAL INFORMATION.

I CAN TELL YOU, MR. BENNETT, HOW GRAND JURIES ARE RUN AND HOW OPERATIONS ARE CONDUCTED IN GENERAL AND ACROSS THE BOARD, MEANING EVERYONE THAT'S INVOLVED IN IT IN MY MIND IS VERY UNSATISFACTORY AND IT IS VERY FRAUGHT WITH DANGER. FOR EXAMPLE, WHERE YOU DO HAVE CIVIL LITIGATION AND ONE SIDE HAS THE ABILITY TO USE THE GRAND JURY OR HAS USED THE GRAND JURY AND HAS THE ADVANTAGE OF THAT IN CIVIL LITIGATION AND THEN AS HERE SAYS TO THE OTHER SIDE IN A CIVIL LITIGATION, "SORRY, YOU CAN'T HAVE IT. YOU CAN'T HAVE ACCESS," THAT IS VERY FRAUGHT WITH DANGER.

THE POSSIBILITY OF THE DISTRICT ATTORNEY'S OFFICE CONDUCTING AN INVESTIGATION IN A

GRAND JURY, AN EXPARTE PROCEEDING GATHERING EVIDENCE EITHER IN CONTEMPLATION OF CIVIL LITIGATION OR FOLLOWING CIVIL LITIGATION AND THEN COUNTY COUNSEL COMING IN AND SAYING, "WELL, I AM THEIR LAWYERS I HAVE THE RIGHT TO IT," IS A [p. 16] REAL POTENTIAL FOR SOME SUBSTANTIAL PROBLEMS. AS YOU KNOW, THE COURT SUPERVISES THE GRAND JURY, AND I HAVE A QUESTION ABOUT THAT. I WOULD ASK YOU TO THINK ABOUT IT WHEN YOU HAVE GRAND JURY MATTERS BECAUSE THERE ARE SOME PROBLEMS HERE THAT NEED TO BE ADDRESSED.

MR. BENNETT: THIS IS AN UNUSUAL CIRCUMSTANCE, ALTHOUGH -

THE COURT: ACTUALLY, I HAVE TO TELL YOU IT IS NOT FROM - BELIEVE ME I COULD GIVE YOU SOME HORROR STORIES ABOUT THE GRAND JURY IN THIS COUNTY AND SOME PROBLEMS THAT HAVE ARISEN.

MR. BENNETT: YOU CAN'T TELL ME HORROR STORIES ABOUT OUR OFFICE.

THE COURT: ABOUT THE GRAND JURY.

MR. BENNETT: I THINK SOMEBODY HAS KNOWLEDGE, THEY HAVE KNOWLEDGE. OKAY. AND IF THE DISTRICT ATTORNEY WAS REPRESENTING HIMSELF IN PRO PER BEING SUED AND HAVING A RIGHT TO ASK A QUESTION ABOUT THE SUIT THAT DEALS WITH WHAT OCCURRED AND HE ASKED A QUESTION BASED ON WHAT HE KNOWS HE CAN DO THAT. NOW, THE FACT THAT THIS MOTION IS MADE HERE IN THE PROPER COURT WE RECOGNIZE THE PROBLEM OF ONE SIDE HAVING IT AND THE OTHER SIDE NOT.

THE COURT: WHY DID YOU OPPOSE IT?

MR. BENNETT: WE OPPOSED IT IN FEDERAL COURT BECAUSE THE FEDERAL COURT HAS NO AUTHORITY TO ORDER IT IN OUR VIEW.

THE COURT: I DISAGREE. THEY CAN ISSUE A SUBPOENA AND COME OVER HERE AND TAKE EVERYTHING OUT OF OUR [p. 17] BUILDING.

MR. BENNETT: I CAN TELL YOU THAT I HAVE WORKED OVER THE YEARS WITH THE U.S. ATTORNEY'S OFFICE THEY HAVE ACKNOWLEDGED OUR POSITION IN THIS MATTER AND YOU WILL FIND THAT ALL OF THEIR MOTIONS ARE MADE HERE NOT IN FEDERAL COURT.

THE COURT: I AGREE. BUT ULTIMATELY IF THE FEDERAL JUDGE WANTED TO ISSUE AN ORDER SAYING, "CLEAR OUT THE 13TH FLOOR," WE BOTH KNOW WHAT WOULD HAPPEN.

I WOULD AGREE WITH YOU THE APPROPRIATE FORUM IS HERE. WHERE I DO HAVE A PROBLEM IS WHERE YOU SAY, "UNDER STATE LAW THIS IS A SECRET PROCEEDING. I HAVE IT, YOU DON'T. TOUGH." NOW, THE WAY TO HANDLE IT WOULD HAVE BEEN, IF YOU SAY, I THINK THAT'S A LITTLE UNFAIR THAT WE HAVE ALL THIS INFORMATION SUBMIT, AN ORDER, A STIPULATION TO THE COURT AND DO IT AS OPPOSED TO TAKING THIS POSITION WHAT ENDS WITH A NOTICED MOTION BEFORE ME.

MR. BENNETT: NOW, WE DID NOT STIPULATE TO ITS RELEASE, WE DID NOT OPPOSE ITS RELEASE. I THINK THERE IS A BIG DIFFERENCE.

MS. PODBERESKY: MAY I BE HEARD?

MR. BENNETT: WE HAVEN'T SAID THE COURT HAS AUTHORITY TO RELEASE IT.

THE COURT: I AM SORRY.

MR. BENNETT: WE HAVE NOT ARGUED THAT THE COURT HAS AUTHORITY TO RELEASE.

MS. PODBERESKY: MY INTERESTS IN REPRESENTING MS. BAKER ARE SOMEWHAT DIFFERENT THAN THE INTERESTS OF [p. 18] MR. GABBERT, AND I WOULD JUST LIKE TO BRIEFLY REVISIT THE REQUEST TO MAYBE HAVE SOME KIND OF TESTIMONY TAKEN IN CONNECTION WITH THIS ISSUE. THE PROBLEM I HAVE AT THIS JUNCTURE IS THAT I MADE TWO TO THREE REQUESTS TO MR. BRAZILE FOR DISCLOSURE OF THAT GRAND JURY TRANSCRIPT.

WHEN I WAS RETAINED TO REPRESENT MS. BAKER IT WAS THREE OR FOUR DAYS BEFORE HER ORIGINALLY SCHEDULED DEPOSITION AND I CALLED MR. BRAZILE AND SAID, "I HAVE BEEN ADVISED THAT YOU HAVE THIS GRAND JURY TESTIMONY. I AM TRYING TO PREPARE FOR THIS DEPO. COULD YOU RELEASE IT TO ME SO I CAN PREPARE, AND CAN WE CONTINUE THE DEPOSITION FOR A WEEK?" HE TOLD ME THAT, AND THIS IS ESSENTIALLY A QUOTE, "YOU DON'T NEED THE TRANSCRIPT. I CAN TELL YOU WHAT IS IN IT. SHE JUST ASSERTED HER FIFTH AMENDMENT RIGHT."

AND I THEN SAID, "WELL, THAT'S FINE, BUT I STILL NEED TO SEE IT FOR MYSELF IN ORDER TO ADVISE MY CLIENT." HE THEN INFORMS ME HE WOULD INQUIRE WITHIN HIS OFFICE OR WITH SOMEBODY TO SEE IF HE COULD DO THAT. HE NEVER GOT BACK TO ME WHETHER OR NOT HE WOULD RELEASE IT, AND I TOOK HIS SILENCE AS AN OPPOSITION TO RELEASING THAT TRANSCRIPT.

SUBSEQUENTLY, I THEN CALLED HIM TO SAY LOOK WE HAVE FILED A PETITION IN STATE COURT TO RELEASE THIS TRANSCRIPT. "CAN'T WE PUT THIS DEPOSITION OVER TWO DAYS OR THE DAY

AFTER SO THAT I CAN HAVE THE BENEFIT TO REPRESENT MY CLIENT ADEQUATELY?" HE DENIED THAT REQUEST AND DEMANDED THE DEPO GO FORWARD.

[p. 19] WHAT TROUBLES ME IS THE NON OPPOSITION TO THIS PETITION NOW APPEARS TO ME ALMOST AS THOUGH IT WAS A SANDBAGGING TACTIC. HE KNEW - IF THE POSITION OF THE COUNTY COUNSEL'S OFFICE IS THAT WHAT WE SHOULD HAVE DONE IS COME TO STATE OR REQUEST THE DISCLOSURE OF THE TRANSCRIPT THAT'S WHAT WE TRIED TO DO. I MAY BE AT FAULT BECAUSE I DID NOT DO IT QUICKLY ENOUGH BY ATTEMPTING TO GET UP TO SPEED TO FIND OUT ALL THE ISSUES IN THE CASE AND WHAT I NEEDED TO KNOW.

I FILED IN CONJUNCTION WITH MS. WIDDIFIELD AND MR. LIGHTFOOT'S OFFICE THIS PETITION, WHICH IS BEFORE THE COURT. IF THE COUNTY COUNSEL'S OFFICE WAS ACTING IN GOOD FAITH IT WOULD HAVE APPEARED TO ME OR SEEMS TO ME THAT HE WOULD HAVE SAID, "FINE. LET'S DEFER THIS DEPOSITION UNTIL THE COURT HAS RULED ON THIS PETITION BECAUSE YOU HAVE FOLLOWED THE APPROPRIATE PROCEDURE."

I NOTICED MR. BENNETT HAS CITED IN NUMEROUS PLACES IN A DIFFERENT CASE THAT ONE OF THE WAYS TO GET TRANSCRIPTS FROM A GRAND JURY IS TO PETITION THE COURT FOR DISCLOSURE, WHICH IS WHAT WE HAVE DONE HERE. NOW, MR. BRAZILE IS THREATENING TO TAKE ME TO COURT ON A MOTION TO COMPEL FURTHER ANSWERS FROM MY CLIENT.

BASED ON THE FACT THAT I DID NOT HAVE THE GRAND JURY TRANSCRIPT I ADVISED MY CLIENT TO ASSERT CERTAIN PRIVILEGES DURING THE COURSE OF THAT DEPOSITION, WHICH I MAY NOT HAVE

OTHERWISE ADVISED HER TO DO BUT NOT HAVING THE GRAND JURY TESTIMONY I ERRED ON THE SIDE OF CAUTION BASED ON WHAT I KNEW FROM MY DISCUSSIONS WITH HER, [p. 20] BASED ON WHAT I KNEW FROM THE CONTEXT OF THE GRAND JURY, HOW IT AROSE AND WHAT ITS FOCUS WAS.

I THEN HAD TO ASSERT CERTAIN PRIVILEGES. I AM NOW IN THE POSITION THAT MR. BRAZILE IS GOING TO DRIVE ME OVER TO FEDERAL COURT ON A MOTION TO COMPEL AND I WILL HAVE NO RULING OR ADVISEMENT FROM THIS COURT TO THE FEDERAL COURT ABOUT WHETHER OR NOT MR. BRAZILE'S FAILURE TO DISCLOSE THE GRAND JURY TRANSCRIPT TO ME WAS PROPER AND APPROPRIATE OR WHETHER HIS RECEIVING THE GRAND JURY TESTIMONY THERE INITIALLY WAS EVEN PROPER OR APPROPRIATE AND A VIOLATION OF GRAND JURY SECRECY.

AND IN FACT HE DID USE PORTIONS OF THAT TRANSCRIPT DURING THE DEPOSITION OF MY CLIENT. BECAUSE HE WAS READING VERBATIM OFF A PIECE OF PAPER SAYING, "DIDN'T YOU SAY THAT," AND QUOTING CERTAIN LANGUAGE THAT APPEARED TO ME TO BE A VERBATIM QUOTE FROM A GRAND JURY TRANSCRIPT. AND HE SO MUCH AS ADMITTED TO ME IN PRIOR TELEPHONE CONVERSATIONS THAT HE HAD POSSESSION OF THAT TRANSCRIPT.

SO, I AM ASKING THIS COURT TO HAVE MR. BRAZILE COME IN HERE TO MAKE FURTHER INQUIRIES SO AT LEAST I HAVE A RECORD WHEN I GO OVER TO FEDERAL COURT AND THE FEDERAL COURT CAN LOOK AT THIS GRAND JURY PROCEDURE AND MAKE SOME DETERMINATION AS TO WHETHER OR NOT A MOTION TO COMPEL MIGHT BE APPROPRIATE OR WHETHER SANCTIONS ARE

REQUIRED OVER IN THE FEDERAL COURT ACTION. OTHERWISE I THINK I AM - I DON'T THINK THE FEDERAL COURT IS GOING TO HAVE ANY AUTHORITY OR WILL WANT TO MAKE ANY KIND OF RULING AS TO WHAT THE STATE COURT LAW AND PROCEDURE IS WITH [p. 21] RESPECT TO THIS DISCLOSURE OF GRAND JURY MATERIAL. SO I AM ASKING THIS COURT TO HAVE A HEARING.

THE COURT: YOU ARE ASKING ME REALLY TO BE A SPECIAL MASTER - IS THIS JUDGE LEW - IN AID OF SOME DETERMINATION HE MADE NEEDS TO MAKE. I CERTAINLY HAVE NO AUTHORITY TO DO THAT. AND MY INTEREST HERE IS MAKING SURE THAT THE RULES OF SECRECY CONCERNING THE GRAND JURY ARE PROPERLY FOLLOWED. I WOULD SUGGEST THAT MY REVIEW INDICATE THAT THERE IS A BIT OF SANDBAGGING HERE, A BIT OF GAME PLAYING. MY ONLY INTEREST - I COULD CARE LESS WHAT HAPPENED WITH JUDGE LEWIS CASE ACROSS THE STREET, BUT IF THE GRAND JURY IS MADE A PART OF THAT GAME PLAYING I HAVE A PROBLEM WITH THAT AND THIS COURT HAS A PROBLEM WITH THAT. AND SO WHEN ONE SIDE RAISES SECRECY AND REFUSES TO TURN SOMETHING OVER AND THEN WHEN THE MOTION IS FILED THEN SAYS, "WELL, WE NO HAVE LONGER OPPOSITION." I HAVE A QUESTION ABOUT THAT.

I WILL DENY YOUR REQUEST TO HAVE ANY FURTHER HEARING. I AM GOING TO SIGN AN ORDER -

MS. WIDDIFIELD: I AM SORRY, YOUR HONOR. IF YOU WANT TO FINISH. I WAS GOING TO ADDRESS THE MATTER OF THE ORDER THAT I RAISED WITH A CLERK EARLIER. THERE IS AN INTERLINEATION IN THE ORDER THAT WAS PRESENT THIS MORNING.

THE COURT: I HAVE A COUPLE OF PROBLEMS WITH THE ORDER. ONE, THIS PROBABLY SHOULD HAVE BEEN TAKEN DOWN BY THE GRAND JURY COURT REPORTER, WHO IS DICK COLBY, WHO CAN BE FOUND IN THE GRAND JURY ROOM AS A GENERAL RULE. IN ALL PROCEEDINGS THAT I HAVE BEEN INVOLVED IN IF ITS A GRAND [p. 22] JURY MATTER HE WILL BE THE REPORTER THAT TAKES IT DOWN. SO THE ORDER I AM GOING TO ISSUE WILL BE THAT YOU GET COPIES OF ALL TRANSCRIPTS FROM HIM PAYING YOUR OWN COSTS. I AM NOT GOING TO PAY FOR CIVIL LITIGATION. AS TO THE MINUTES THAT MAY OR MAY NOT EXIST DO YOU KNOW IF THEY EXIST?

MR. BENNETT: MY UNDERSTANDING OF THE ORDER THAT WAS BROUGHT TO MY ATTENTION DEALT ONLY WITH A TRANSCRIPT OF THE TESTIMONY OF MS. BAKER.

THE COURT: THE MOTION ACTUALLY REQUESTS ALL THE MINUTES AS WELL. WELL, THE GRAND JURY MINUTES REQUESTING ALL APPEARANCES OF MS. TRACY BAKER - THEY ALL RELATE TO MS. BAKER, DO THEY NOT?

THE COURT: YES.

MR. BENNETT: NOT TO ANYBODY ELSE.

THE COURT: AND THE GRAND JURY LOGS REFLECTING ALL APPEARANCES BY MS. BAKER. THIS IS WHAT I WILL DO. I DIDN'T DRAFT ANYTHING OUT BECAUSE I DIDN'T KNOW.

THE COURT WILL FIND THAT THERE HAS BEEN A PARTICULARIZED NEED SHOWN BY THE PETITIONER FOR THE GRAND JURY MATERIAL THAT OUTWEIGHS ANY SECRECY ISSUES. THAT THE SECRECY ISSUES ARE OUTWEIGHED BY THE FACT THAT THERE IS A CIVIL LITIGATION ONGOING TO

WHICH ONE SIDE HAS SOMETHING THAT IS MATERIAL THAT THE OTHER SIDE DOES NOT HAVE, AND THE COURT BELIEVES IT WILL BE UNFAIRNESS COMBINED WITH THE FACT THAT THIS CASE EVIDENTLY DID NOT END IN PROSECUTION, AND IN THAT CASE THAT - THEREFORE, THE PARTICULARIZED NEED CERTAINLY OUTWEIGHS THE NEED FOR CONTINUED SECRECY.

[p. 23] THE COURT WILL ORDER THAT COUNSEL UPON PAYMENT TO THE COURT CLERK - THE COURT REPORTER TO THE GRAND JURY SHALL RECEIVE A COPY OF THE TRANSCRIPT OF THE TESTIMONY OF TRACY BAKER BEFORE THE LOS ANGELES COUNTY GRAND JURY ON MARCH 21 1994;

THAT COUNSEL CAN CONTACT, I GUESS COUNTY COUNSEL WOULD BE THE PERSON TO CONTACT TO GET COPIES OF THE GRAND JURY LOGS.

MR. BENNETT: I DON'T BELIEVE WE HAVE POSSESSION OF THAT.

MR. LIGHTFOOT: LET ME SPEAK.

THE COURT: BUT YOU ARE COUNSEL FOR THE GRAND JURY.

MR. BENNETT: I AM NOT APPEARING AS COUNSEL FOR THE GRAND JURY. WE DO HAVE A STATUTORY HOUSE COUNSEL RELATIONSHIP. THE GRAND JURY CAN ASK ME FOR LEGAL ADVICE, IF A CONFLICT DOES NOT OTHERWISE INTERFERE WITH MY DUTY I CAN PROVIDE IT TO THEM, BUT IN THIS CASE OUR OFFICE REPRESENTS PARTIES IN LITIGATION AND I AM NOT THE PROPER ONE TO ADVISE THE GRAND JURY ON THIS MATTER. ONCE THAT BECOMES CLEAR TO ME IN THIS CASE I HAVE CEASED PROVIDING THAT ADVICE.

THE COURT: WELL, EITHER YOUR OFFICE OR THE DISTRICT ATTORNEY'S OFFICE HAS THE NOTES; RIGHT?

MR. BENNETT: MR. WHITE WOULD BE THE ONE TO WHOM THIS SHOULD BE PROPERLY DIRECTED, HE IS THE ONE WHO IS PRESENTLY THE CUSTODIAN OF THE RECORD, I GUESS, AT THE MOMENT SINCE THERE IS NO SECRETARY ANYMORE.

MR. LIGHTFOOT: WE HAD SERVED THE CUSTODIAN A [p. 24] SUBPOENA FOR THESE RECORDS AND WE UNDERSTOOD THAT THE COUNTY COUNSEL -

THE COURT: THAT'S RIGHT. COUNTY COUNSEL RESPONDED AS CUSTODIAN. YOU ALREADY INDICATED ON THE RECORD THAT YOU REPRESENTED THE GRAND JURY

MR. BENNETT: IN THE FEDERAL COURT AND I SHOULDN'T HAVE.

THE COURT: WELL, YOU HAVE.

MR. BENNETT: I HAVE APPEARED HERE.

THE COURT: COUNTY COUNSEL IS ORDERED TO PROVIDE THE GRAND JURY LOG REFLECTING -

MR. BENNETT: I DO NOT HAVE THE LOG.

THE COURT: - REFLECTING ALL APPEARANCES FOR TRACY BAKER BEFORE THE GRAND JURY ON MARCH 21, 1994;

COUNTY COUNSEL IS ORDERED TO PROVIDE THE GRAND JURY MINUTES REFLECTING ALL APPEARANCES BY TRACY BAKER BEFORE THE GRAND JURY ON MARCH 21, 1994;

I BELIEVE IT WILL BE DICK COLBY WHO SHOULD ALSO HAVE THE TRANSCRIPT OF THE CONTEMPT PROCEEDINGS RELATING TO TRACY BAKER CONDUCTED ON MARCH 21, 1994, BEFORE JUDGE COOPER.

I FURTHER ORDER THAT PAUL GABBERT MAY DISCUSS ANY AND ALL PROCEEDINGS WITH HIS COUNSEL AT ANY TIME.

I WILL NOT SET THE MATTER DOWN FOR A RETURN. I DON'T THINK THERE IS ANY NEED FOR IT, YOU SHOULD BE ABLE TO GET THIS STUFF AND WORK IT OUT.

MR. BENNETT: COST OF TRANSCRIPTS?

THE COURT: I DID SAY THAT ALREADY.

[p. 25] MR. LIGHTFOOT: CAN I JUST SPEAK TO ONE PORTION OF YOUR ORDER?

THE COURT: YES.

MR. LIGHTFOOT: DURING THE DEPOSITION OF MR. GABBERT MR. BRAZILE PUT CERTAIN QUESTIONS TO MR. GABBERT AND INDICATED THAT HE WAS PURSUING THE QUESTION BASED ON INFORMATION THAT HE GOT FROM A LOG OR I DON'T KNOW WHAT THE PARTICULAR PHRASE SHOULD BE, BUT IT APPEARED TO BE SOMETHING THAT INDICATED WHO WENT INTO THE GRAND JURY AND WHEN THOSE PEOPLE WENT INTO THE GRAND JURY. AND HE INDICATED ON THE RECORD AND IN THE RECORD OF THE GRAND JURY

THE COURT: LET ME JUST STATE IT AGAIN -

MR. LIGHTFOOT: LET ME JUST TELL THE COURT THAT ONE OF THE ISSUES HERE, ONE OF THE CLAIMS THAT WE ARE MAKING IS THAT MR. GABBERT'S CONSTITUTIONAL RIGHT TO REPRESENT

HIS CLIENT IN THESE GRAND JURY PROCEEDINGS WAS INTERFERED WITH BECAUSE HE WAS TAKEN INTO A ROOM AND SEARCHED FOR A PERIOD OF TIME WHILE MS. BAKER WAS TAKEN INTO THE GRAND JURY AND ASKED QUESTIONS. AND NOW AN ISSUE HAS ARISEN AS TO WHAT WAS HAPPENING INSIDE THE GRAND JURY WHEN MR. GABBERT HAD BEEN TAKEN OFF TO THE SIDE ROOM AND SEARCHED BY THIS SPECIAL MASTER. SO, I NOW COME BACK TO WHAT WAS INDICATED BY MR. BRAZILE DURING THE DEPOSITION OF MR. GABBERT, HE INDICATED -

MR. BENNETT: COULD I OBJECT? THIS IS NOT IN THE RECORD. I DON'T BELIEVE THAT THE COURT CAN. -

THE COURT: MR. BENNETT, LET HIM FINISH.

[p. 26] MR. LIGHTFOOT: MR. BRAZILE INDICATED THAT HE HAD THE GRAND JURY LOG OR SOME SORT OF DOCUMENT WHICH INDICATED THE PRECISE TIMES WHEN MS. BAKER WENT INTO THE GRAND JURY ROOM AND THE PRECISE TIMES WHEN MR. ZOELLER, THE BEVERLY HILLS POLICE OFFICER WHO WAS ALSO PRESENT DURING THE MORNING'S PROCEEDINGS, WENT INTO THE GRAND JURY ROOM. SO WE WOULD ASK THE COURT TO ENLARGE THE ORDER WITH RESPECT TO THIS LOG AT LEAST TO THE EXTENT THAT IT INDICATES WHAT HAPPENED IN THE TOTALITY OF CIRCUMSTANCES THAT MORNING, INCLUDING WHEN OTHER PEOPLE WENT INTO THE GRAND JURY IN ADDITION TO MS. BAKER BECAUSE IT WOULD HAVE RELEVANCE TO THE ISSUE BEFORE -

MR. BENNETT: I DON'T THINK THERE IS EVIDENCE OF THAT BEFORE THE COURT. I UNDERSTAND WHAT'S BEING REPRESENTED, I CANNOT

REFUTE IT, BUT I MEAN IT IS NOT IN THE RECORD, IN EVIDENCE BEFORE THE COURT. YOU HAVE A SIMPLE MOTION FOR RELEASE THAT WAS UNOPPOSED, AND I WOULD SUBMIT THAT THAT'S BEYOND THE SCOPE OF THIS HEARING. THEY HAVE A LOT OF CIVIL DISCOVERY MATTERS TO BE BROUGHT OUT IN FRONT OF JUDGE LEW BUT SHOULD NOT BE LITIGATED HERE.

MR. LIGHTFOOT: I THINK HE JUST SAID THEY BRING THAT HERE.

MR. BENNETT: IF HE BRINGS A MOTION FOR IT IT CAN COME HERE, BUT THAT MOTION IS NOT HERE.

MR. LIGHTFOOT: YOUR HONOR, AS AN OFFICER OF THE COURT I CAN TELL YOUR HONOR THAT I WAS A PERCIPIENT WITNESS TO THE COMMENTS MADE BY MR. BRAZILE AND I AM NOW, IF THE COURT FEELS IT IS APPROPRIATE TO PUT ME UNDER OATH [p. 27] I WILL TELL THE COURT THAT'S WHAT I HEARD MR. BRAZILE SAY.

THE COURT: ALL RIGHT.

I BELIEVE IT IS WITHIN THE CONFINES OF THE MOTION.

THE GRAND JURY LOG REFLECTING ALL APPEARANCES BY ALL WITNESSES CONCERNING THIS INVESTIGATION BEFORE THE GRAND JURY ON MARCH 21, 1994, SHALL ALSO BE ORDERED.

MR. BENNETT: COULD I ALERT THE COURT, ALTHOUGH MS. BAKER IS BEING REPRESENTED BY COUNSEL SHE IS AWARE OF THE RELEASE OF THAT TESTIMONY. OTHER WITNESSES NOT HAVING ANY REPRESENTATION HERE ARE NOT NOW IN TERMS OF OUR NON OPPOSITION, I THINK THAT WAS A

SIGNIFICANT FACTOR IN MY ADVICE TO MR. BRAZILE ABOUT NOT OPPOSING THIS. AGAIN, I SAY WE ARE NOT TAKING A POSITION ON THE COURT'S AUTHORITY HERE IT IS SOLELY A QUESTION OF NO OPPOSITION ON THIS MOTION THAT WAS FILED.

THE COURT: I DON'T THINK THERE IS ANY QUESTION OF THE COURT'S AUTHORITY.

MR. BENNETT: I CAN ONLY SAY THIS THAT THE SUPREME COURT HAS MADE IT RATHER CLEAR THERE IS STATUTORY BASIS FOR ANYTHING WITH REGARDS TO THE GRAND JURY DOCUMENTS. THERE IS ARGUABLY ONE WITH REGARDS TO MS. BAKER.

THE COURT: ACTUALLY THE SUPREME COURT, CALIFORNIA SUPREME COURT HAS CITED ALL THE FEDERAL CASES WHICH TALK ABOUT A PARTICULARIZED NEED TO BE SHOWN, WHICH OVERCOMES THE POLICY OF SECRECY. THAT IS WHY I MADE THE FINDING WHICH I JUST MADE A FEW MOMENTS AGO.

MR. BENNETT: I WOULD AGREE THAT'S IN DIRECT [p. 28] CONFLICT TO MC CLATCHY.

THE COURT: I READ MC CLATCHY AGAIN LAST NIGHT AND YOU ARE WRONG.

THE ORDER WILL STAND. THAT WILL BE IT.

MR. BENNETT: NOTICE IS NOT WAIVED ON THE COURT.

THE COURT: I AM SORRY?

MR. BENNETT: I WOULD LIKE A COPY OF THE ORDER. WHAT I AM INDICATING IS THAT NOTICE IS NOT WAIVED.

THE COURT: IF YOU WANT YOU CAN
SPEAK TO THE COURT CLERK. YOU CAN GET A
COPY OF IT.

MS. LIGHTFOOT: THANK YOU, YOUR
HONOR.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 101

HON. J. STEPHEN
CZULEGER, JUDGE

IN RE THE MATTER OF) CASE NO.
GRAND JURY SUBPOENA FOR) BH000656
TRACY L. BAKER,)
) REPORTER'S
) CERTIFICATE

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

I, M. HELEN THEISS, CSR, #2264, OFFICIAL
REPORTER OF THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA, FOR THE COUNTY OF LOS
ANGELES, DO HEREBY CERTIFY THAT THE FOREGO-
ING PAGES 1 THROUGH 28, COMPRISE A FULL, TRUE
AND CORRECT TRANSCRIPT OF THE PROCEEDINGS
HELD AND TESTIMONY TAKEN IN DEPARTMENT

NO. 101 IN THE MATTER OF THE ABOVE-ENTITLED
CAUSE ON MAY 19, 1995.

DATED THIS 24TH DAY OF MAY, 1995.

/s/ M. Helen Theiss CSR #2264
M. HELEN THEISS,
OFFICIAL REPORTER

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of
California, at Talcott, Lightfoot, Vandeveld, Woehrle &
Sadowsky, 655 South Hope Street, 13th Floor, Los
Angeles, CA 90017. I am over the age of 18 and not a
party to the within action.

On September 18, 1995, I served the foregoing docu-
ment described as EXHIBITS IN SUPPORT OF PLAIN-
TIF GABBERT'S CONSOLIDATED OPPOSITION TO
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT
on the plaintiff in this action by placing the true copies
thereof enclosed in a sealed envelope addressed as fol-
lows:

SEE ATTACHED

I caused such envelope with postage thereon fully
prepaid to be placed in the United States mail at Los
Angeles, California. I am readily familiar with the firm's
practice of collection and processing correspondence for
mailing with the United States Postal Service and the fact
that the correspondence would be deposited with the

United States Postal Service that same day in the ordinary course of business.

Executed on September 18, 1995, at Los Angeles, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Irene Duarte
By: IRENE DUARTE

ATTACHMENT

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CONN and NAJERA

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NO. CV 94-4227
	)	RSWL (Ex)
Plaintiff,)	
	)	DEFENDANTS CONN
vs.	)	AND NAJERA'S REPLY
	)	MEMORANDUM OF
DAVID CONN, CAROL	)	POINTS AND
NAJERA, ELLIOTT	)	AUTHORITIES; AND
OPPENHEIM, LESLIE	)	DECLARATION OF
ZOELLER and DOES 1	)	DAVID CONN
through X.)	
	)	(Filed Sept. 22, 1995)
Defendants.)	
	)	DATE: OCTOBER 2, 1995
	)	TIME: 9:00 A.M.
	)	COURTROOM: "21"

TO PLAINTIFF, PAUL GABBERT AND YOUR ATTORNEYS OF RECORD:

Defendants David Conn and Carol Najera hereby submit the attached Reply Memorandum of Points and

Authorities and Declaration of David Conn Support of their Motion for Summary Judgment.

Dated: September 22, 1995

DE WITT W. CLINTON
County Counsel

By /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy County
Counsel

Attorneys for Defendants
CONN and NAJERA

MEMORANDUM OF POINTS AND AUTHORITIES

I. DEFENDANTS CONN AND NAJERA ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE PLAINTIFF HAS FAILED TO ESTABLISH A VIOLATION OF CLEARLY ESTABLISHED LAW.

When a defendant raises the defense of qualified immunity the plaintiff bears the initial burden of proving that the defendants violated a clearly established constitutional right. *See Romero v. Kitsap County* 931 F.2d 624, 627 (9th Cir. 1991); *Neely v. Feinstein* 50 F.3d 1502, 1509 (9th Cir. 1995). A clearly established right is one which is sufficiently clear that a reasonable official would understand that what he is doing violates the right. *See Anderson v. Creighton* 483 U.S. 635, 640, 107 S.Ct. 3034, 3939, 97 L.Ed.2d [sic] 523 (1987); *Mendenhall v. Goldsmith* 59 F.3d 685, 692 (7th Cir. 1995). The particular facts of the case determine whether clearly established law was violated by the defendants. *See Backlund v. Barnhart* 778 F.2d 1386,

1389 (9th Cir. 1985); *Newell v. Sauser* ___ F.3d ___ (9th Cir. 1995), 95 Daily Journal D.A.R. 12365.

A review of the undisputed facts shows that neither Conn nor Najera violated a clearly established right or law. Plaintiff concedes that he was not allowed to be present with his client when she went before the grand jury to testify. *See Uncontroverted Material Fact No. 3.* Therefore, the mere fact that plaintiff was to be searched while Tracy Baker was to testify before the grand jury was not a violation of his fourteenth amendment right to practice his profession. Since plaintiff has failed to cite any analogous cases to the instant action, it was not possible for either Conn or Najera to know that they were somehow violating plaintiff's right to practice his profession when he was searched, pursuant to a valid warrant, while his client testified before the grand jury. Thus, the absence of either binding or analogous case precedent shows that Conn and Najera did not violate clearly established law. *See e.g. Richardson v. Oldham* 12 F.3d 1373, 1381 (5th Cir. 1994); *Horta v. Sullivan* 4 F.3d 2, 13 (1st Cir. 1993).

To prove that defendants Conn and Najera violated clearly established law plaintiff must show that the right or law violated was clearly established in a particularized and relevant sense, because government officials are only liable for transgressing bright lines. *See e.g. Maciariello v. Summer* 973 F.2d 295, 298 (4th Cir. 1992). The reason for this rule is that qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. *See e.g. Schroeder v. McDonald* 55 F.3d 454, 461 (9th Cir. 1995).

Hence, in order for the law to be clearly established for purposes of qualified immunity the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendants' place, that what he is doing violates federal law. *See Pickens v. Hollowell* 59 F.3d 1203, 1206 (11th Cir. 1995). Furthermore, when considering whether the law applicable to certain facts is clearly established, the facts need not be the same as the facts of the immediate case, but they do need to be materially similar. *See Pickens v. Hollowell* id. For example, mere recitations of general rules or abstract rights do not demonstrate the law was clearly established at the time of the relevant conduct. *See Lassiter v. Alabama A & M Univ. Bd. of Trustees* 28 F.3d 1146, 1150 (11th Cir. 1994) and *Post v. City of Fort, Lauderdale* 7 F.3d 1552, 1557 (11th Cir. 1993) (If case law, in factual terms, has not staked out a bright line, qualified immunity protects the defendant).

Plaintiff alleges that the only occasion in which he was denied access to his client was during the first search. *See Uncontroverted Material Facts* Nos. 19 and 21. Defendants Conn and Najera did not participate in the first search because they were examining Tracy Baker before the grand jury. *See Uncontroverted Material Fact* Nos. 7-8, and 10. It is also undisputed that plaintiff requested that the first search take place in a private room. *See Uncontroverted Material Fact* Nos. 8-9. Furthermore, it is undisputed that each time Tracy Baker made a request to speak with plaintiff her requests were granted. *See Uncontroverted Material Facts* Nos. 42-48.

There is no binding case law, analogous, or similar case precedent which could have alerted Conn and

Najera that they somehow interfered with plaintiff's right to practice his profession when they honored Tracy Baker's requests to confer with her attorney. Since Conn and Najera did not accompany Tracy Baker out of the grand jury room when she left and because Tracy Baker never advised or informed them that she did not or could not speak with her attorney when she was allowed to leave, it was not possible for either Conn and Najera to knowingly violate plaintiff's constitutional rights. Moreover, it is undisputed that Conn and Najera did not personally do anything to prevent plaintiff from speaking with his client when Baker was given permission to leave the grand jury hearing room. *See Uncontroverted Material Facts* 52-57.

Due to plaintiff's failure to present any facts which show that either Conn or Najera actively or personally prevented him from speaking to his client, he has failed to prove that Conn and Najera violated clearly established law. Furthermore, since Tracy Baker gave every indication that she had in fact spoken with plaintiff based upon how she asserted her fifth amendment privilege, neither Conn nor Najera knowingly violated the law.

II. THE CONDUCT OF CONN AND NAJERA WAS OBJECTIVELY REASONABLE EVEN IF THEY VIOLATED CLEARLY ESTABLISHED LAW.

A defendant is entitled to qualified immunity even where he violates the law if the person's conduct was objectively reasonable in light of pre-existing law. *See e.g. Romero v. Kitsap County* 931 F.2d 624, 627 (9th Cir. 1991); *Neely v. Feinstein* 50 F.3d 1502, 1509 (9th Cir. 1995). Thus,

if any reasonable prosecutor could have believed that the conduct of Conn and Najera was lawful then the defendants are entitled to qualified immunity. See *e.g. Post v. City of Fort Lauderdale* 7 F.3d 1552, 1557 (11th Cir. 1993); *Eversole v. Steele* 59 F.3d 710, 717 (7th Cir. 1995).

The conduct of Conn and Najera was objectively reasonable for three (3) distinct reasons. First, each time Tracy Baker made a request to consult with plaintiff she was allowed to leave the Grand Jury hearing room without any interference from Conn or Najera. Second, Tracy Baker gave every indication that she had in fact consulted with plaintiff, because after she left and returned to the grand jury room, she never advised anyone that she had not spoken with her attorney. See Declarations of Conn and Najera. Finally, once Tracy Baker left the grand jury room to consult with plaintiff, Conn and Najera did not do or say anything to prevent, delay or interfere with plaintiff's efforts to speak to his client. Furthermore, it should be noted that Tracy Baker always asserted her fifth amendment right on the advice of counsel, which would lead a reasonable person to conclude that she had in fact consulted with her attorney.

Since plaintiff has failed to present evidence that Conn and Najera engaged in conduct which prevented or interfered with him speaking to Baker after she had gone before the grand jury, the conduct of Conn and Najera was objectively reasonable. In addition, when one considers the Grand Jury transcript (See Exhibit "2") along with plaintiff's concession that he was only denied access to his client during the first search, which Conn and Najera had no personal participation in, it is obvious that Conn and Najera acted reasonably. Moreover, in the

absence of a binding, analogous or similar factual case precedent to the instant action, the conduct of Conn and Najera was undoubtedly objectively reasonable, because no reasonable prosecutor would have believed Conn or Najera's conduct was unlawful. This is especially true when one also considers that plaintiff was searched pursuant to a valid warrant and in a private room that plaintiff himself requested. See Uncontroverted Material Facts Nos. 8-10.

III. PLAINTIFF HAS FAILED TO PRESENT SUFFICIENT EVIDENCE OF ANY REAL OR IMMEDIATE THREAT OF FUTURE INJURY.

Under Federal Rule of Civil Procedure 56(c), a party is entitled to summary judgment when the pleadings, depositions . . . together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See *Musick v. Burke* 913 F.d. [sic] 1390, 1393 (9th Cir. 1990). The standard for summary judgment is the same standard used to judge a Motion for Directed Verdict, which is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. See *Musick v. Burke* id. At page 1394; *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 251-252, 106 S.C. 2505, 2512, 91 L.Ed.2d 202 (1986).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment because the requirement is that there be no genuine issue of *material*

fact. See *Hanon v. Data products Corp.* 976 F.d. [sic] 497, 500 (9th Cir. 1992); *Anderson v. Liberty Lobby, Inc.* *supra* 477 U.S. at 247-248. A material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. See *Hanon v. Data products Corp.*, *id.* At page 500. Conversely, where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574, 587, 106 S.C. 1348, 1356, 89 L.Ed.2d. 538 (1986); *Hanon v. Data products Corp.* *id.* at page 500; *Nishimoto v. Federman-Bachrach & Associates* 903 F.d. [sic] 709, 716 (9th Cir. 1990).

The non-moving party cannot to successfully oppose a motion for summary judgment by an affidavit containing conclusory allegations. See *Anderson v. Liberty Lobby, Inc.* *supra* 477 U.S. at 249; *Lujan v. National Wildlife Federation* 497 U.S. 871, 110 S.C. 3177, 3188, 111 L.Ed.2d 695 (1990). Moreover, the mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient to defeat a properly supported motion for summary judgment. See *Anderson v. Liberty Lobby Inc.*, *id.* 106 S.C. At 2512.

In the case of *Celotex Corp. V. Catrett* 477 U.S. 317, 106 S.C. 2548, 2552-2553, 91 L.Ed.2d. 265 (1986), the Supreme Court held that summary judgment shall be entered against a party who fails to establish an essential element of that party's case, by stating as follows:

"In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on the essential element of her case with respect to which she has the burden of proof."

In *Anderson v. Liberty Lobby, Inc.* *supra*, 106 S.C. 2505, the court articulated the standard of proof the non-moving party must meet to defeat a motion for summary judgment, by stating:

"Instead, the plaintiff must present *affirmative evidence* in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant as long as the plaintiff has had a full opportunity to conduct discovery." (Emphasis added)

The only evidence offered by plaintiff for declaratory relief is the declaration he has submitted. The declaration submitted by plaintiff is inadequate because it is based upon speculation and conjecture, as well as hearsay. Thus, defendants hereby object on the grounds of: 1) hearsay, 2) speculation and conjecture 3) lack of foundation and 4) lack of personal knowledge, to paragraph 2, lines 16-18 of the declaration. Defendants also object to paragraph 3, lines 20-21 of the declaration on the grounds

of: 1) hearsay 2) lack of personal knowledge 3) lack of foundation and 4) speculation.

Plaintiff's declaration alleges at paragraph 4, lines 24-28, "on information and belief," that the prosecutors did not obtain a letter purportedly written from Lyle Menendez to Tracy Baker, and he further alleges in paragraph 4 that he "believes" the District Attorneys Office will again attempt to obtain this purported letter. Defendants hereby object to paragraph 4 in its entirety on the grounds of: 1) hearsay 2) lack of foundation 3) lack of qualification 4) speculation and 5) lack of personal knowledge.

Plaintiff also alleges that if Tracy Baker is subpoenaed to testify in the future he will represent her. However, plaintiff does not even know if and when Tracy Baker will be subpoenaed in the future, and his belief that she may is based on mere hunches and paranoia.

According to the attached declaration of David Conn there is no immediate or threatened likelihood that Tracy Baker will be called back before the grand jury, because she is not on the witness list of either the prosecution or defense in the second Menendez brothers trial, which has already commenced. The only reason Ms. Baker was called before the grand jury in March, 1994, was due to the testimony she gave at the first Menendez trial which formed the sole basis for the perjury investigation by the grand jury. (See Exhibit "2", at pages 37-46). However, since neither the prosecution nor defense intends to call her as a witness in the second trial, there would be no basis for subpoenaing her once again before the grand jury. Moreover, since Ms. Baker repeatedly asserted her

fifth amendment privilege during the grand jury proceeding on March 21, 1994, it would be futile to subject her to another grand jury proceeding, where all she would do is assert her fifth amendment privilege again.

To obtain injunctive relief plaintiff must show that the threat of injury is real and immediate, instead of only conjectural or hypothetical. *See e.g. Orantes-Hernandez v. Thornburgh* 919 F.d. [sic] 549, 557 (9th cir. 1990). Moreover, a showing of only one alleged incident of unconstitutional conduct is insufficient to obtain injunctive relief. *See e.g. Orantes-Hernandez v. Thornburgh* id. At page 558. The declaration of plaintiff only articulates a conjectural or hypothetical injury, that is extremely remote and unlikely to occur because Tracy Baker is not expected to be called as a witness in the second trial. Furthermore, since March, 1994, plaintiff cannot point to any other occasion where the District Attorneys office has allegedly interfered with his constitutional rights or the rights of his clients.

To conclude, in light of the evidentiary deficiencies of plaintiff's declaration, and the hypothetical nature of the alleged threat of future harm, and the lack of a series of unconstitutional incidents, plaintiff has failed to offer sufficient evidence to support his claim for declaratory or injunctive relief. Dated: September 22, 1995

DE WITT W. CLINTON

County Counsel

By /s/ Kevin C. Brazile

KEVIN C. BRAZILE

Principal Deputy County Counsel
Attorneys for Defendant
CONN and NAJERA

DECLARATION OF DAVID CONN

If called as a witness I could and would competently testify to all of the facts and information contained herein based upon my own, first-hand, personal knowledge.

1. I am an attorney at law duly licensed and practicing before all of the Courts of the State of California, and I am a Deputy District Attorney with the Los Angeles County District Attorneys Office. I have been employed with the District Attorneys Office since 1978, and on March 21, 1994, I was one (1) of two (2) deputy district attorneys assigned as the prosecutors on the case entitled *People v. Eric and Lyle Menendez*.

2. I am the lead prosecutor in the second trial of Eric and Lyle Menendez, in which jury selection commenced this month. The reason Tracy Baker was subpoenaed before the grand jury on March 21, 1994, was for an inquiry into possible perjury she committed during the first Menendez trial when she testified as a witness. During her grand jury testimony Tracy Baker asserted her fifth amendment privilege to all questions pertaining to the Menendez brothers.

3. Tracy Baker will not be called as a witness in the second Menendez trial because she is not on my witness list and she is not on the witness lists submitted by Eric and Lyle Menendez. Since Ms. Baker is not expected to testify at the second trial there is no likelihood that she would be called before the grand jury regarding a possible perjury investigation. Furthermore, it would be useless to call her before the grand jury again about her testimony in the first trial, because she would only assert her fifth amendment privilege once again.

4. The only criminal case that I am handling at the present time is the Menendez case and plaintiff, Paul Gabbert, is not the attorney of record for either of the defendants in that case. I know of no reasons why plaintiff would be subjected to any further searches, pursuant to a warrant, and I am not aware of any clients of his who are likely to testify before the grand jury in the future.

5. Tracy Baker will not be called as a witness by the prosecution in the second Menendez trial, and I do not know of any value she could serve the defense by testifying. Thus, any contention by plaintiff that Tracy Baker is a potential prosecution witness is false and plain wrong, because I do not intend to call her as a witness and she is not on any witness lists.

I declare all the foregoing to be true and correct under penalty of perjury.

Executed this 21st Day of September, at Los Angeles, California.

/s/ David Conn
DAVID CONN

PROOF OF SERVICE

STATE OF CALIFORNIA)
) s.s.
COUNTY OF LOS ANGELES)

I am employed in the County aforesaid; I am over the age of eighteen and not a party to the within action; my

business address is 500 West Temple Street, Los Angeles, California 90012.

On September 22, 1995, I served the within DEFENDANTS CONN AND NAJERA'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES; AND DECLARATION OF DAVID CONN in the case of *Paul L. Gabbert v. David Conn, et al. Case No. CV 94-4227 RSWL (Ex)* by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in a United States mail box in Los Angeles, California, addressed as follows:

Scott D. MacLatchie
FRANSCCELL, STRICKLAND, ROBERTS
225 S. Lake Avenue Penthouse
Pasadena, Ca. 91101-3005

Michael J. Lightfoot
TALCOTT, LIGHTFOOT, VANDDEVELDE,
655 S. Hope Street, 13th Fl.
Los Angeles, Ca. 90017

and that the person on whom said service was made has his office at a place where there is a delivery service by United States mail, and that there is a regular communication by mail between the place so addressed.

service was made has his a delivery service by United regular communication by mail

I declare under penalty of perjury that the foregoing true and correct.

Executed on this 22th day of September, 1995 at Los Angeles, California.

/s/ Barbara J. Holmes
BARBARA J. HOLMES

United States District Court for the
Central District of California

[Caption Omitted In Printing]

October 3, 1995 Judgment and Order Granting Defendants Conn & Najera's Motion to Dismiss

* * *

10/3/95 61 JUDGMENT AND ORDER: by Judge Ronald S. Lew against plaintiff Paul L. Gabbert granting dft conn & Najera motion for Summary judgment [38-1] (ENT 10/5/95) (lk) [Entry date 10/05/95]

* * *

Docket as of March 12, 1996 3:15 pm

No. 97-1802

David Conn and Carol Najera,

Petitioners

v.

Paul L. Gabbert

ORDER ALLOWING CERTIORARI. Filed October 5, 1998.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted limited to the following questions:

1. Does a prosecutor violate an attorney's rights under the Fourteenth Amendment by causing the attorney to be searched at the time his client is testifying before a grand jury?
2. If the answer to the first question is "yes," was such a right on the part of the attorney clearly established in March, 1994?

October 5, 1998

5

No. 97-1802

FILED

NOV 18 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

October Term, 1998

DAVID CONN and CAROL NAJERA,

Petitioners,

vs.

PAUL L. GABBERT,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Does a prosecutor violate an attorney's rights under the Fourteenth Amendment by causing the attorney to be searched at the time his client is testifying before a grand jury?

2. If the answer to the first question is "yes", was such a right on the part of the attorney clearly established in March, 1994?

LIST OF PARTIES

The Parties are Petitioners/Defendants David Conn and Carol Najera and Respondent/Plaintiff Paul Gabbert.¹

¹ Other Defendants who are not parties to this petition include the City of Beverly Hills, Detective Leslie Zoeller, and Special Master Elliot Oppenheim.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in *Gabbert v. Conn*, 131 F.3d 793 (9th Cir. 1997). The order denying the petition for rehearing and rejecting the suggestion for rehearing en banc was not reported. A copy of the opinion and order denying the petition for rehearing and rejecting the suggestion for rehearing en banc are annexed in the appendix to the petition for certiorari as Appendices A and F, respectively.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed on December 8, 1997. A timely petition for rehearing and suggestion for rehearing en banc was denied by order filed on February 2, 1998. The underlying action arose under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the District Court's jurisdiction was based on 28 U.S.C. § 1331. Jurisdiction of this court was invoked under 28 U.S.C. § 1254(1). Petitioners' Petition for Writ of Certiorari was filed in the Supreme Court on May 4, 1998 (Supreme Court Case No. 97-1802). This Court's order granting certiorari was issued on October 5, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the Respondent under 42 U.S.C. § 1983, which provides:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity

or other proper proceeding for redress. For the purposes of this section, an Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

This Court granted certiorari to determine whether petitioners violated the fourteenth amendment, which provides in pertinent part:

FOURTEENTH AMENDMENT (Section 1):

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Procedural History Of The Litigation In The District Court And Summary Of The Ninth Circuit's Opinion.

Plaintiff and Respondent, Paul Gabbert (hereinafter to be referred to as Respondent) sued Petitioners David Conn and Carol Najera for violating his federal civil rights under 42 U.S.C. § 1983.¹ Respondent's Section 1983 claims were based upon the fourth, sixth and fourteenth amendments of the United States Constitution. Respondent filed his complaint on June 23, 1994, in the United

¹ The City of Beverly Hills, City of Beverly Hills Police Detective Leslie Zoeller, and Special Master Elliot Oppenheim were also defendants.

States District Court for the Central District of California. (J.A. 6).

On September 30, 1994, the District Court granted in part and denied in part the Petitioners' motion to dismiss made pursuant to the Federal Rules of Civil Procedure, Rule 12(b)(6), dismissing all of the Respondent's claims except for his fourteenth amendment claim for interference with his right to practice his profession. (Pet. App. B). On February 8, 1995, the District Court denied Respondent's motion for leave to file a First Amended Complaint to add a state law cause of action under California Penal Code Section 1524. (Pet. App. C, Pages C-2 and C-5).

On October 3, 1995, the District Court granted summary judgment in favor of the Petitioners and against the Respondent. (Pet. App. D and E).

The District Court granted Petitioners' Motion for Summary Judgment on the basis of qualified immunity, but it refused to grant the Petitioners' Motion for Summary Judgment on the ground of absolute prosecutorial immunity.

On October 19, 1995, Respondent filed a timely notice of appeal to the United States Court of Appeals for the Ninth Circuit. On December 8, 1997, the Ninth Circuit reversed the summary judgment granted in favor of Petitioners for the following reasons: (1) Petitioners violated Respondent's fourteenth amendment right to practice his profession without interference by the Government; (2) Respondent's fourteenth amendment right to freely render legal assistance to his client whenever she chose to seek his advice regarding her grand jury testimony was clearly established; and (3) the Petitioners' conduct was not objectively reasonable. The Ninth Circuit also reversed the dismissal of Respondent's fourth amendment claims as to Petitioner David Conn with regard to the second search conducted by Detective Leslie Zoeller (Pet. App. A), and it upheld the District Court's denial of absolute prosecutorial immunity. On February 2, 1998,

the Ninth Circuit denied the Petitioners' petition for rehearing and rejected the Petitioner's suggestion for rehearing en banc. (Pet. App. F, Page F-1).

B. Summary Of The Evidence

Respondent Paul Gabbert is a criminal defense attorney who represented Traci Baker during a grand jury investigation. Prior to retaining Respondent as her counsel, Traci Baker testified as a defense witness in the highly publicized first murder trial of Lyle and Erik Menendez, who were later convicted in their second murder trial after the first trial ended in a hung jury. Subsequent to the first trial the Los Angeles County District Attorney's Office reassigned the second murder trial of the Menendez brothers to prosecutors David Conn and Carol Najera.

Once the first trial was completed the District Attorney's office learned that Lyle Menendez had purportedly written a letter to Traci Baker, wherein he instructed her to testify falsely. The letter was also believed to be a "script for her testimony." Upon discovering this information David Conn obtained a subpoena directing Traci Baker to testify before the Los Angeles County grand jury, and to produce any correspondence that she had received from Lyle Menendez.

On February 11, 1994, Traci Baker retained Respondent Paul Gabbert to represent her, because she had learned that the District Attorney's office was conducting an investigation related to her testimony. On March 17, 1994, Beverly Hills Police Department Detective Leslie Zoeller, who was the investigating detective assigned to the Menendez murder case, served the grand jury subpoena on Traci Baker at Respondent's law office. According to the subpoena, Traci Baker was commanded to appear before the grand jury on March 21, 1994, and she was required to bring with her "any correspondence" from Lyle Menendez.

On March 18, 1994, Respondent filed an ex parte Motion to Quash the portion of the subpoena that required Traci Baker to produce correspondence from Lyle Menendez. However, on the same day, a Los Angeles Superior Court Judge denied Respondent's ex parte motion to shorten time for the hearing on the Motion to Quash. Also, on March 18, 1994, Detective Leslie Zoeller obtained a search warrant for Traci Baker's apartment for any correspondence from Lyle Menendez. Later that same day Detective Zoeller, accompanied by Prosecutors David Conn and Carol Najera, served the search warrant on Traci Baker at her apartment. When the search warrant was presented to Ms. Baker she stated that, "all the things that you're looking for are with my attorney." The search of Ms. Baker's apartment did not lead to the recovery of any of the correspondence specified in the warrant. This led the prosecutors and Detective Zoeller to believe that the items called for in the search warrant were in the possession, custody and control of Respondent.

On March 21, 1994, Respondent and Traci Baker appeared at the Los Angeles County Criminal Court's Building for Baker's grand jury testimony as mandated by the grand jury subpoena. Respondent and Traci Baker arrived at the Criminal Court's Building at about 7:30 a.m., and they checked in with the grand jury bailiff at about 8:30 a.m. At approximately 10:03 a.m., a search warrant was obtained for Respondent, and Ms. Baker. A few minutes before 10:54 a.m., Respondent was approached by Detective Leslie Zoeller who presented him a search warrant for his briefcase, his person and Ms. Baker's person. The search warrant was limited to being served between the hours of 7:00 a.m. and 10:00 p.m.

Once Respondent was served with the search warrant he was introduced to Special Master Elliot Oppenheim who would be conducting the search. After meeting the Special Master, Respondent read the search warrant and then advised the Special Master that they would need a private room. Respondent's request for the

private room to conduct the search was granted. At approximately the same time that Respondent was going to a private room with the Special Master, Ms. Baker was summoned to appear before the grand jury, but Respondent made no request to the Petitioners that his client's grand jury testimony be delayed. Traci Baker entered the grand jury hearing room to begin her testimony at approximately 10:54 a.m., and she completed her testimony at about 11:12 a.m. When Traci Baker entered the grand jury room Petitioners, David Conn and Carol Najera, were inside the hearing room and Baker was questioned before the grand jury by Carol Najera.

After being sworn, the first question asked of Traci Baker by Carol Najera was "are you acquainted with the defendant Lyle Menendez," and she replied that she was unable to speak with her attorney because he was still with the special master, and she asked to go confer with Respondent. Consequently, Ms. Baker was granted permission to leave the hearing room. Shortly after Ms. Baker's departure from the hearing room, Petitioners exited the grand jury room, but they did not follow nor accompany Ms. Baker to Respondent.

Upon leaving the grand jury hearing room, Ms. Baker sought out Respondent, who was being searched by the Special Master. A female, believed to be the secretary of David Conn, learned that Baker needed to speak with Respondent, so she went to the private room where the search was being conducted and advised Respondent that his client needed to speak with him. Respondent replied that he couldn't talk to Ms. Baker now, and that it will have to wait because he was being searched. The secretary then told Respondent that his client needs to talk to him right now. Respondent replied, "That's tough . . . they can wait as long as it takes."

Although Ms. Baker did not speak with Respondent at this time, she saw him from across the room while he was taking off his jacket. As a result of Respondent's body language or something he said verbally, she got the

indication from him that she should go back into the grand jury hearing room and assert her fifth amendment right. Therefore, Traci Baker returned to the grand jury hearing room to resume her testimony, but once she returned, she did not advise Petitioners that she was either unable to or had not consulted with Respondent. Consequently, the prosecutors were led to believe that she had consulted with Respondent, in accordance with her request to leave the grand jury room, because they were not present when Traci Baker observed Respondent.

When Traci Baker was recalled before the grand jury she was once again asked, "are you acquainted with the Defendant Lyle Menendez," and based upon the verbal indication or body language she had received from Respondent, she asserted, on the advice of counsel, her fifth amendment rights. The next question asked of Traci Baker was did she know Lyle Menendez in August of 1989. She replied, "I have to go confer with counsel . . . This is what I have been instructed to do," which further led the Petitioners to believe that she had consulted with Respondent when her first request to consult with Respondent was granted. Her request to consult with Respondent a second time was granted, and she left the grand jury hearing room to consult with Respondent while Petitioners remained inside the hearing room.

Traci Baker returned to the grand jury hearing room after a short pause and once again she was asked by Carol Najera if she knew Lyle Menendez in August of 1989. Traci Baker's response was, "based upon the advice of counsel, I respectfully decline to answer the question because my answer might tend to incriminate me." This response convinced the prosecutors that she had consulted with Respondent during the second break in the grand jury proceedings. Carol Najera then asked Traci Baker if she had brought with her the documents specified in the subpoena, and Traci Baker's reply was that, "I'm going to have to again confer." Based upon this last response David Conn made a request to the grand jury

foreman to have the presiding judge determine whether or not her answer may tend to incriminate her. Consequently, a 10 minute recess was taken so that a conference could be held with the presiding judge, and during the recess Traci Baker was excused. Traci Baker's last response further assured the prosecutors that she had once again consulted with Respondent when she was excused to do so.

After the 10 minute recess, Traci Baker returned to the grand jury hearing room whereupon she was ordered by the grand jury foreman to go directly to Department 110 of the Superior Court for a contempt proceeding regarding her failure to produce the documents specified in the grand jury subpoena, and she was also declared in contempt of the grand jury. This was also the conclusion of her grand jury testimony and the time was approximately 11:12 a.m. when she left the grand jury hearing room for the last time.

Once Traci Baker was directed to Department 110, she met with Respondent and she was present when Respondent was subjected to a second search, this time by Detective Leslie Zoeller, outside of the grand jury room. The second search lasted about 5 minutes and, after it was completed, Respondent conferred with Traci Baker in a private room about her grand jury testimony. After Respondent conferred with Traci Baker about her grand jury testimony, he accompanied her to Department 110 for the contempt hearing. Respondent was present with and represented Traci Baker during the entire contempt hearing held in Department 110. The contempt hearing commenced at 11:40 a.m. and it concluded either shortly before or shortly after 12:00 noon.

SUMMARY OF THE ARGUMENT

1. -A prosecutor does not violate an attorney's fourteenth amendment rights by causing the attorney to be searched when his client is testifying before the grand

jury, because said conduct by a prosecutor is not a violation of the substantive component of the due process clause. The substantive sphere of the due process clause is only violated when government officials engage in abusive, arbitrary or oppressive conduct. The prosecutors' decision to cause the search while Respondent's client was before the grand jury was not arbitrary or abusive, because the search was conducted pursuant to a valid search warrant. In addition, since Respondent had no constitutional right to be present in the grand jury room with his client, the search was in no way arbitrary or conscience shocking in a constitutional sense.

Another reason why the prosecutors' conduct was not arbitrary or abusive is that each time Traci Baker made a request to consult with her attorney, she was allowed to do so without any limitations or restrictions placed on either her or Respondent. Furthermore, the prosecutors were never advised nor made aware that once Traci Baker was excused from the proceedings she did not consult with her attorney. Also, causing the search was not a fourteenth amendment violation because implicit in the execution of a valid search warrant is a necessary interruption or delay of a person's activities.

The prosecutors did not deprive Respondent of occupational liberty or his right to practice his profession, because he was not excluded from the practice of law nor foreclosed from practicing his profession by the prosecutors' conduct. The valid search warrant only caused a temporary interruption in Respondent's ability to provide legal assistance to his client. His situation was analogous to where a person is not rehired in one job but is free to seek another job, which this court has held is not a deprivation of liberty. Although Respondent was temporarily distracted from providing legal assistance to his client, due to the execution of a valid search warrant, once the search was completed he continued to represent

his client as well as consult with her without any limitations or restrictions. Therefore, a mere temporary interruption in one's job is not a deprivation of a liberty interest.

The Ninth Circuit's decision in *Gabbert v. Conn*, 131 F.3d 793 (9th Cir. 1997), was wrongly decided because it allows for a fourteenth amendment violation to be established when government officials are engaged in lawful conduct. Under the *Gabbert v. Conn*, *supra*, decision, a person could delay or prevent the execution of a valid search warrant by invoking the fourteenth amendment, because under the *Gabbert* case any time the government executed a search warrant on a person who was either engaged in his occupation or simply on the way to his job or place of business, the government would be in violation of the person's fourteenth amendment rights.

The prosecutors did not violate any fourteenth amendment property rights of Respondent because their conduct did not result in the termination of his employment. The fact that Respondent continued to represent his client after the search conducted by the Special Master illustrates that Respondent's employment was not terminated. Further, Respondent was not deprived of a property interest because the prosecutors' conduct did not deprive him of future employment.

Another reason why Respondent was not deprived of his fourteenth amendment rights is because the prosecutors did not act with deliberate indifference, nor was their conduct conscience shocking. It is only the most egregious and conscience shocking government conduct that is cognizable under the substantive sphere of the due process clause. However, the prosecutors did not act with deliberate indifference because each of Traci Baker's requests to consult with Respondent were granted without any restrictions. Furthermore, the prosecutors were unaware that Traci Baker did not consult with Respondent when the proceedings were stopped for her to do so, and since the witness asserted her fifth amendment rights

upon the advice of counsel each time she returned to the grand jury room after being excused, the prosecutors believed that the witness had in fact consulted with Respondent.

There was no violation of the procedural due process component of the fourteenth amendment because there were adequate post-deprivation state law tort remedies available to plaintiff. Although a procedural due process claim was neither alleged in the complaint nor addressed by the Ninth Circuit, such a claim is barred because Respondent did not pursue his remedies under state tort law, such as claims for negligence or breach of a mandatory duty.

2. The prosecutors did not violate clearly established law because as of March, 1994, it was not clearly established that a prosecutor violates an attorney's fourteenth amendment rights by causing him to be searched when his client is called to testify before a grand jury. As of March 1994, neither the U.S. Supreme Court nor any of the 12 federal circuit courts of appeal had specifically held that a prosecutor violates an attorney's fourteenth amendment rights by causing the attorney to be searched, pursuant to a valid search warrant, when the attorney's client is testifying before a grand jury. In addition, there are no factually similar or analogous cases from either the U.S. Supreme Court nor the 12 federal circuit courts that made it apparent, in March 1994, that a prosecutor violates the law by causing an attorney to be searched at the time his client is testifying before the grand jury.

The Ninth Circuit's "common sense" standard for determining whether the law is clearly established does not provide the proper guideposts for evaluating whether the substantive component of the due process clause has been violated. In *Gabbert v. Conn*, 131 F.3d 793 (9th Cir. 1997), the court expanded the concept of liberty too far, because no reasonable prosecutor would have believed or known that under the pre-existing law in effect in March,

1994, that a search conducted pursuant to a valid warrant, on an attorney who had no right to accompany his client inside the grand jury room, could result in the deprivation of the attorney's fourteenth amendment right to practice his profession. Furthermore, it was neither obvious nor apparent under the case law as of March, 1994, that an attorney's fourteenth amendment right to occupational freedom could delay or prevent the execution of a valid search warrant.

The Ninth Circuit's "common sense" standard is too abstract and vague for determining when the law is clearly established, and therefore, this court should adopt a standard for determining clearly established law that requires a factually similar or analogous case from the U.S. Supreme Court on the issue in question, in order for the law to be clearly established. In the alternative, this court should adopt the bright line standard, which is used by some of the federal circuits, to determine when the law is clearly established. This court should also reject any standard for determining whether the law is clearly established which allows district court decisions to set clearly established law, because such a standard would place an unreasonable legal research obligation on government officials, and would make qualified immunity the rare exception rather than the general rule.

ARGUMENT

I. A PROSECUTOR DOES NOT VIOLATE AN ATTORNEY'S FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS RIGHTS BY CAUSING THE ATTORNEY TO BE SEARCHED WHEN HIS CLIENT IS TESTIFYING BEFORE A GRAND JURY.

The Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of life, liberty or property without due process of law. See U.S.C. Constitution, Amendment 14, Section 1. A claim under the fourteenth amendment's due process

clause must be based on either substantive or procedural due process. See *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972) (The requirements of procedural due process apply only to the deprivation of an interest encompassed by the fourteenth amendment's protection of liberty and property); *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992) (due process clause of fourteenth amendment has a substantive component).

The substantive component of the due process clause protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them. See *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986); *Collins v. City of Harker Heights, Tex.*, id., 503 U.S. at 125, 112 S.Ct. at 1068. The purpose of the due process clause is to prevent government officials from abusing their power or employing it as an instrument of oppression. See *County of Sacramento v. Lewis*, 523 U.S. ___, 118 S.Ct. 1708, 1713, 140 L.Ed.2d 1043 (1998); *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990) (Due process clause contains a substantive component that bars arbitrary or wrongful government actions regardless of the fairness of the procedures used to implement them); *Daniels v. Williams*, id., 474 U.S. at 332, 106 S.Ct. at 662 (purpose of due process clause is to prevent government power from being used for purposes of oppression.) The substantive component of the due process clause is violated by executive action only when it can be characterized as arbitrary, or conscience shocking in a constitutional sense. See *County of Sacramento v. Lewis*, id., 523 U.S. ___, 118 S.Ct. at 1716-1717, *Collins v. City of Harker Heights*, id., 503 U.S. at 129, 112 S.Ct. at 1071 (Due process clause not violated unless deprivation of liberty interest was arbitrary in a constitutional sense); *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935 (1974) (The touchstone of due process is

protection of the individual against arbitrary action of government).

Prosecutors David Conn and Carol Najera did not engage in any arbitrary or wrongful conduct when the Special Master, Elliot Oppenheim, searched Respondent Paul Gabbert pursuant to a properly issued searched warrant, because Respondent did not have a constitutional right of any kind to be present inside the grand jury hearing room while his client was testifying before the grand jury. In *United States v. Mandujano*, 425 U.S. 564, 581, 96 S.Ct. 1768, 1779, 48 L.Ed.2d 212 (1976), this Court observed that a grand jury witness who had a right to the assistance of counsel could not demand that his attorney accompany him into the grand jury room, by stating:

"A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel . . . under settled principles the witness may not insist upon the presence of his attorney in the grand jury room. Fed. Rule Crim. Proc. 6(d)." See also *U.S. v. Williams*, 504 U.S. 36, 49, 112 S.Ct. 1735, 1743, 118 L.Ed.2d 352 (1992).

Since a witness does not have a constitutional right to have his or her attorney present in the grand jury room, it naturally follows that the attorney of the witness does not have a constitutional right to be present with his client in the grand jury room. Thus, in the absence of a constitutional right belonging to the attorney to be present in the grand jury room with a witness, the conduct of Prosecutors Conn and Najera of subjecting Respondent to a valid search warrant while his client was testifying before the grand jury was neither arbitrary nor wrongful government conduct.²

² In *Gabbert v. Conn*, 131 F.3d 793, 804 (9th Cir. 1997), the court acknowledged that the search conducted by the Special Master was pursuant to a lawful warrant.

The federal circuit courts have held that a grand jury witness does have a right to consult with an attorney waiting outside the grand jury room during the proceeding. See, e.g., *United States v. Plache*, 913 F.2d 1375, 1380 (9th Cir. 1990); *United States v. Schwimmer*, 882 F.2d 22, 27 (2nd Cir. 1989); *In Re Grand Jury Proceedings*, 859 F.2d 1021, 1024 (1st Cir. 1988); *In Re Grand Jury Subpoena*, 97 F.3d 1090, 1093 (8th Cir. 1996). However, although a grand jury witness has a right to consult with an attorney outside of the grand jury room, this right belongs to the witness and not the attorney. Consequently, the attorney cannot predicate a claim under 42 U.S.C. Section 1983 on the rights of his client. See *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975) (plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the rights of third parties); In accord, see *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955, 104 S.Ct. 2839, 2846, 81 L.Ed.2d 786 (1984).

Another reason prosecutors Conn and Najera did not engage in the kind of arbitrary and wrongful conduct the fourteenth amendment was designed to prevent is because each time grand jury witness Traci Baker asked to consult with Respondent, the grand jury proceedings were recessed to allow her to seek legal advice. For example, once the grand jury proceeding began, it was halted on three (3) separate occasions so that Traci Baker could consult with Respondent. On each of these occasions prosecutors Conn and Najera allowed the witness to leave the grand jury room without any restrictions on where, how long, or in what manner she could consult with Respondent. In addition, no limits were placed on the witness regarding what she could discuss with Respondent and there were no monitoring requirements placed upon her consultation with Respondent.

A further reason why the prosecutors did not engage in the kind of arbitrary or abusive conduct required to show a fourteenth amendment violation is because

Respondent was searched pursuant to a valid warrant. Government power is not used for oppression when the government is executing a valid and duly issued search warrant that only temporarily interrupts a person's activities, because implicit in the execution of a warrant is the interruption of a person's activities.

In light of the fact that the witness was given access to Respondent each time she made a request to consult with him, and because Respondent was available to his client even though he was being searched by the Special Master, pursuant to a valid warrant, the conduct of Petitioners Conn and Najera does not constitute the kind of arbitrary or wrongful conduct required for a substantive due process violation of the fourteenth amendment.

A. The Prosecutors Did Not Deprive Respondent Of A Fourteenth Amendment Liberty Interest Because He Was Not Excluded From The Practice Of Law.

One of the liberties protected by the due process clause of the fourteenth amendment is occupational liberty. See *Greene v. McElroy*, 360 U.S. 474, 492, 79 S.Ct. 1400, 1411, 3 L.Ed.2d 1377 (1959) (right to hold specific private employment and to follow a chosen profession free from unreasonable governmental inference is a liberty interest); *Board of Regents v. Roth*, id., 408 U.S. at 572, 92 S.Ct. at 2707 (liberty denotes right of individual to engage in any common occupation of life); see also *Meyer v. State of Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923).

A person is deprived of his fourteenth amendment liberty interest in occupational freedom when the conduct of the government excludes the person from his chosen occupation. For example, in *Schwartz v. Board of Bar Exam. of State of N.M.*, 353 U.S. 232, 238, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957), this court held that the state deprived a person of his occupational liberty interest by denying him the license necessary to practice law:

"A state cannot **exclude** a person from the practice of law or from any other occupation in a manner or for reasons that contravene due process." (Emphasis Added)

In *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961), this court held that the denial of a security clearance to an employee of a military base did not deny the employee of her fourteenth amendment right to follow her chosen profession, because she remained free to obtain employment elsewhere or to get another job. In other words, all that she was denied was the opportunity to work at one isolated and specific military installation, which does not constitute a deprivation of the right to practice her profession.³ This court has also held that a person's liberty interest in the right to practice his profession is violated where the person is effectively excluded from his occupation. See, e.g., *Dent v. State of West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889) (physician denied certificate to practice medicine). Further, in *Truax v. Raich*, 239 U.S. 39, 41, 36 S.Ct. 7, 60 L.Ed. 131 (1915), this court ruled that a due process claim may lie where the state acted to significantly diminish a person's chances of obtaining employment.

The significance of *Schwartz*, *supra*, *Cafeteria and Restaurant Workers Union*, *supra*, and *Truax*, *supra*, is that in order to deprive a person of a fourteenth amendment liberty interest, the government's conduct must somehow exclude the person from his occupation or trade. Similarly, the federal circuit courts have also required that a person be excluded in some way from his occupation or trade as a prerequisite for establishing a deprivation of a liberty interest. For example, in *Colaizzi v. Walker*, 812 F.2d

³ See also *Board of Regents v. Roth*, id., 408 U.S. at 575, 92 S.Ct. at 2708 (. . . it stretches the concept too far to suggest that a person is deprived of liberty when he is not rehired in one job but remains free to seek another).

304, 307 (1987),⁴ the Seventh Circuit held that a person is deprived of a liberty interest when he is **banned** from his occupation or employment, by stating:

"If a state or the federal government formally banned a person from a whole category of employment, it would be infringing liberty of occupation - a component of the liberty that the due process clause of the fifth and fourteenth amendment protect . . ." See also *Illinois Psychological Ass'n v. Falk*, 818 F.2d 1337, 1343-44 (7th Cir. 1987).

In *Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 65 (1994), the Ninth Circuit ruled that to show that a city's acts violated a person's substantive due process right to engage in the occupation of their choice, the city's conduct had to make plaintiffs unable to pursue an occupation in the amusement game business. Furthermore, in *Wedges/Ledges of California, Inc., id.*, 24 F.3d at 65, the Ninth Circuit ruled that the fact a city temporarily banned one (1) particular type of amusement game did not in itself establish that the city unduly interfered with either the gaming operators or manufacturer's ability to pursue their livelihood in the amusement game industry. In addition, in *FDIC v. Henderson*, 940 F.2d 465, 474 (1991), the Ninth Circuit ruled that to establish a deprivation of a liberty interest a state banking official must show that the acts of the state left him unable to pursue any comparable job in the banking industry.

In *Martin v. Memorial Hospital at Gulfport*, 130 F.3d 1143, 1149 (1997), the Fifth Circuit held that a hospital deprives a physician of his constitutionally protected liberty interest when it effectively forecloses the physician

⁴ The Seventh Circuit views occupational liberty as being protected by the procedural due process sphere and not the substantive due process component of the fourteenth amendment. See *Zorzi v. County of Putnam*, 30 F.3d 885, 895 (7th Cir. 1994).

from practicing in the area. See also *Daly v. Sprague*, 675 F.2d 716, 727 (5th Cir. 1982). The Eleventh Circuit has also held that a person's liberty interest to follow a chosen profession free from unreasonable government interference only occurs when the plaintiff has been precluded from engaging in his profession. See *Pirollo v. City of Clearwater*, 711 F.2d 1006, 1011 (11th Cir. 1983); see also *Morley's Auto Body Inc. v. Hunter*, 70 F.3d 1209, 1217 n.5 (11th Cir. 1995).

The Prosecutors did not violate Respondent's fourteenth amendment right to occupational freedom (i.e., right to practice his profession) by causing him to be searched when his client testified before the grand jury, because the Petitioners' conduct did not ban nor exclude Respondent from practicing law. For example, Respondent could have asked Mr. Conn's secretary to tell his client to advise the prosecutors to wait until after the search was completed so that he could provide her with legal assistance. If Respondent had done this, the witness would have told the prosecutors she had not consulted with Respondent, and then the prosecutors would have delayed her testimony until after the search. However, ~~instead of advising the prosecutors that she had not consulted with Respondent~~, the witness would instead return to the grand jury and invoke, on the advice of counsel, her fifth amendment right. Consequently, the prosecutors were led to believe that the witness had in fact consulted with Respondent, and therefore, the prosecutors continued the grand jury proceedings unaware that the witness had not consulted with Respondent.

Once the grand jury proceeding was concluded, Respondent continued to practice his profession by representing the witness at the contempt hearing. Hence, what happened to Respondent here is analogous to the situation where a person is not allowed to pursue a specific job, but is still able to pursue or practice his or her chosen occupation by way of another job or assignment. Yet the instant matter is less intrusive than the forbearance of a

specific job, because it is merely a brief delay in the pursuit of one's job. Therefore, since Respondent was only temporarily and legally interrupted in pursuing his job, and continued to pursue his job after the search, he was not deprived of occupational liberty.

Under federal case law there are essentially three (3) forms of state action that could result in a person being deprived of his fourteenth amendment right to pursue or engage in his profession. The first form is where state action stigmatizes a person so as to damage his reputation in the community such that he cannot earn a living in his chosen profession. See *Board of Regents of State Colleges v. Roth*, id., 408 U.S. at 573, 92 S.Ct. at 2707; *Paul v. Davis*, 424 U.S. 693, 709-710, 96 S.Ct. 1155, 1164, 47 L.Ed.2d 405 (1976). However, the foregoing form of a liberty deprivation was not alleged in the complaint by Respondent and it was rejected by the Ninth Circuit in any event. See *Gabbert v. Conn.*, id., 131 F.3d at page 801, n.2.

The second situation where state action causes a deprivation of a person's right to practice his profession is where the person is denied the required license for practicing his profession. See, e.g., *Schwartz*, id., 353 U.S. at 238, 77 S.Ct. at 752. However, this case presents no licensing question. Finally, a person may be deprived of a liberty interest when he is denied collateral credentials necessary for pursuing his occupation. See, e.g., *Greene v. McElroy*, id., 360 U.S. at 492-493, 79 S.Ct. at 1411-1412. Once again, such a situation is not present here.

Since the conduct of the prosecutors in subjecting Respondent to a valid and lawful search while his client was testifying before the grand jury, did not result in Respondent being banned or foreclosed from practicing law, there was no fourteenth amendment substantive due process violation of his liberty interest. Further, any contention by Respondent that this fourteenth amendment rights were violated when he was subjected to a search when his client was testifying before the grand jury is

untenable, because each time the witness, Traci Baker, made a request to consult with Respondent, her request was granted. Also, when Traci Baker sought out Respondent while he was being searched, he replied that he "could not talk" because he was being searched, and "they" will have to wait. Once again, nothing precluded Respondent from replying that his client should tell the prosecutors to wait until after the search so that he could consult with her.

If Respondent had specified that his client should advise the prosecutors to wait until the search was completed, he could have consulted with her for as long as, and about any topic, and without any interruptions whatsoever, before she returned to the grand jury hearing room to resume her testimony. Hence, it was not the prosecutors' conduct which allegedly prevented Respondent from consulting with his client, but instead, it was his decision not to speak to his client and to inform her that she should tell the prosecutors to wait until after the search was completed.⁵ In short, Respondent was afforded the ability and opportunity to consult freely with his client.

By choosing not to consult with his client when he had the opportunity to do so, which would have been after the search, Respondent was neither banned nor foreclosed by the prosecutors' conduct from practicing his profession. However, it is anticipated that Respondent will contend that the prosecutors violated his fourteenth amendment rights by relying on the case of *Keker v. Procunier*, 398 F.Supp. 756 (E.D. Cal. 1975), where the court held that an attorney's fourteenth amendment

⁵ The Prosecutors did not give the Special Master any directions on how or in what manner the search warrant should be executed. The Prosecutors did not advise the Special Master that the search, once commenced, could not be interrupted. Further, Respondent and the Special Master were alone while the search warrant was being executed.

rights were violated when the attorney had to meet with his client in a hot or uncomfortable room, and if the attorney's communications with his client were affected by telephone restrictions, surveillance, or partitions. Respondent's reliance on *Keker v. Procunier, supra*, here would be misplaced and unpersuasive, because what distinguishes *Keker* from the present action, is that here the prosecutors' interruptions of Respondent's alleged right to practice law was caused by a duly and lawfully issued search warrant. In contrast, in *Keker*, the restrictions placed on the attorneys were not due to a valid search warrant.

The significance of a valid search warrant lies in the fact that inherent in the execution of a search warrant is an interruption, distraction, or delay of the activities of the person being searched. Furthermore, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by a warrant and it may be necessary to interfere with rights not explicitly considered by the judge who issued the warrant. See *Dalia v. United States*, 441 U.S. 238, 257-258, 99 S.Ct. 1682, 1693, 60 L.Ed.2d 177 (1979). Thus, the fact that execution of a search warrant may result in temporary delay or inconvenience to what a person is doing, or of his or her daily activities, does not make the actions of the government officials causing the warrant to be executed arbitrary, abusive or wrongful. See, e.g., *Dalia v. U.S.*, id., 441 U.S. at 257-258, 99 S.Ct. at 1693-1694. Otherwise, in nearly every occasion wherein a search warrant is executed, a person could sue and recover damages under the fourteenth amendment arising from a lawful search. For example, suppose the police executed a valid search warrant on an attorney's law office while the attorney was in his office giving legal advice to a client. Further assume that as a result of the search the attorney is interrupted and delayed for a period of 20 minutes before he could finish advising his client. Has this attorney been deprived of his

fourteenth amendment liberty interest in the right to practice his profession free from governmental interference? The answer is an emphatic "No", because once the search is over the attorney will merely continue to practice his profession by advising his client. In comparison, once the search of Respondent was completed, he continued to practice his profession by representing the witness at a contempt proceeding shortly (i.e., approximately 30 minutes) after the search of Respondent was completed. Hence, Respondent was not deprived of his fourteenth amendment right to practice his profession.

B. It Is Against Public Policy And Contrary To The Purposes Of The Fourteenth Amendment To Find A Violation Of The Fourteenth Amendment Where The Government Is Engaged In Lawful Conduct.

The substantive component of the due process clause is designed to prevent clearly arbitrary, wrongful and abusive government conduct. See *Zinerman v. Burch*, id., 494 U.S. at 125, 110 S.Ct. at 983; *County of Sacramento v. Lewis*, id., 118 S.Ct. at 1713; *Collins v. Harker Heights*, id., 503 U.S. at 126, 112 S.Ct. at 1069. Yet the Ninth Circuit's decision in *Gabbert v. Conn*, *supra*, is contrary to the purposes of the fourteenth amendment, as well as against public policy, because it allows for a fourteenth amendment substantive due process violation when the government is engaged in lawful and valid conduct. To illustrate, in *Gabbert v. Conn*, *supra*, the Ninth Circuit found a fourteenth amendment violation even though the search of Respondent was pursuant to a valid warrant and notwithstanding the fact that Respondent had no constitutional right to be with his client in the grand jury room. Also, the warrant was executed by a Special Master, as required by California law and the warrant could be executed any time between 7:00 a.m. to 10:00 p.m. Consequently, the Ninth Circuit penalized the prosecutors for engaging in lawful conduct by unjustifiably expanding Respondent's fourteenth amendment rights.

The Ninth Circuit's decision in *Gabbert v. Conn, supra*, is a dangerous precedent because it allows government officials to be exposed to fourteenth amendment liability for engaging in conduct that is lawful, and neither arbitrary nor abusive. For example, suppose an attorney was scheduled to meet his client who was a witness scheduled to testify before the Grand Jury Room at 10:00 a.m. Both the attorney and client also know that the attorney will not be allowed to be present in the grand jury hearing room, and the prosecutors know that the attorney must pass through metal detectors before he can be allowed to wait outside the grand jury hearing room. The witness testifies before the grand jury and during her testimony she asks to speak with her attorney. The prosecutors allow the witness to leave the hearing room to consult with her attorney, but she is unable to do so because her attorney and his briefcase are being searched by the court bailiffs at the metal detector station with the attorney's consent. Under the decision in *Gabbert v. Conn, supra*, the attorney who was subject to being searched at the metal detector station would have a fourteenth amendment claim against the prosecutors for an alleged violation of his right to practice his profession. Moreover, the attorney could even sue the bailiffs operating the metal detector because they delayed him in getting to his client.

Another example of the unfair and unreasonable consequences of the Ninth Circuit's decision in *Gabbert* is illustrated by the situation of where the police set up a roadblock. Suppose that the police set up a roadblock at the only road leading to the local courthouse, because they are searching for an escaped prisoner who is armed and dangerous and believed to be in the area. As a result of the roadblock, an attorney en route to the local courthouse for a trial is delayed for two (2) hours, because the police are searching the trunks and interiors of cars traveling the road. In addition, with the attorney's consent, the trunk and interior of his car is searched by the police before he can proceed to the courthouse.

When the attorney arrives at the courthouse he is two (2) hours late and upon his arrival he learns that the court has dismissed his case because he did not announce ready for trial when the case was called 90 minutes earlier. In accordance with the *Gabbert* decision the tardy attorney could bring a fourteenth amendment claim against the police operating the roadblock, because they deprived him of the right to practice his profession, which in this instance would be going to trial.

The roadblock hypothetical is a realistic one because it is factually analogous to the case of *Boyle v. City of Liberty, Mo.*, 833 F.Supp. 1436 (W.D. Mo. 1993). In *Boyle*, police officers established a roadblock to stop another vehicle being pursued by Highway Patrol Officers. At the time of the roadblock the defendant police officers maintaining the roadblock knew that traffic was heavy and that a shift change at many businesses in the nearby city was about to occur. The roadblock caused a mile long line of traffic in both lanes of travel. As a result of the roadblock and delay in which it caused, the plaintiffs sued the police officers operating the roadblock under 42 U.S.C. § 1983, for violating their right to freedom of employment, which was alleged to be a liberty interest protected by the due process clause of the fourteenth amendment. The District Court rejected the plaintiffs' fourteenth amendment claim, by stating at page 1446:

Even if the plaintiffs intend a more conventional "freedom of employment" claim, the plaintiffs have not pled sufficient facts to state a claim for breach of that right. In *Board of Regents v. Roth*, 408 U.S. 564, 572, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972), the court stated that the concept of liberty incorporates the right of the individual "to engage in any of the common occupations of life." The state would breach that right if the state made a charge against a person that would seriously damage that person's standing and association in the community, or

imposed a stigma or other disability that foreclosed future employment. *Id.* at 573, 92 S.Ct. at 2707. The plaintiffs in this case do not allege that their standing and associations in the community are damaged or that they are foreclosed from future employment. Accordingly, the court will dismiss the plaintiffs' claims for breach of the right of freedom of employment. (Emphasis added).

Since the *Gabbert* decision would allow police, prosecutors, and other government officials to be sued under the fourteenth amendment for conduct that was lawful, and no matter how minor the delay or distraction of a person's work, the *Gabbert* decision is against public policy and contrary to the purpose of the fourteenth amendment, because it stretches too far the concept of liberty.

C. The Prosecutors Did Not Deprive Respondent Of A Fourteenth Amendment Property Interest By Causing Him To Be Searched While His Client Testified Before The Grand Jury.

To establish a claim of deprivation of a property interest without due process of law, the Respondent must show he had a cognizable property interest. *See Board of Regents v. Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. However, in order to have a constitutionally protected property interest, the Respondent must have more than an abstract need or desire for it and he must also have more than a unilateral expectation of it. *See Board of Regents v. Roth*, *id.* To have a constitutionally protected property interest a person must have a legitimate claim of entitlement to the right. *See Board of Regents v. Roth*, *id.*

Property interests are not created by the constitution, but rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, or rules or

understandings that secure certain benefits and that support claims of entitlement. *See Roth*, *id.*, 408 U.S. at 577, 92 S.Ct. at 2709; *Phillips v. Washington Legal Foundation*, 524 U.S. ___, 118 S.Ct. 1925, 1930, 141 L.Ed.2d 174 (1998).

To prove a governmental violation of a fourteenth amendment property interest a person must be excluded or somehow banned from his profession, or terminated from his job. *See, e.g., Perry v. Sinderman*, 408 U.S. 593, 599, 92 S.Ct. 2694, 2698, 33 L.Ed.2d 570 (1972) (The mere showing that a person was not rehired in one particular job, without more, does not amount to a showing of loss of property); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985) (Deprivation of property interest occurs if there is a right to continued employment).

In *Gabbert v. Conn*, *supra*, the Ninth Circuit did not characterize Respondent's fourteenth amendment claim as a deprivation of a property interest. Furthermore, the Respondent's complaint does not allege a deprivation of a property interest guaranteed to him by some independent source. Nevertheless, if Respondent now claims that being subjected to a search when his client went to testify before the grand jury was a deprivation of a property interest, such a contention would be meritless, because he was never foreclosed from practicing law and he did not lose his job of representing the witness. In fact, once Respondent's client's grand jury testimony was completed he immediately represented her at a contempt hearing. Consequently, in light of Respondent's failure to plead a deprivation of a property interest, and because he was neither banned from the further practice of law nor did he lose a job, there was no deprivation of a property interest under the fourteenth amendment.⁷

⁷ There was no deprivation of life without due process of law because Respondent was not killed by the prosecutors' conduct. *See County of Sacramento v. Lewis*, *id.*, 118 S.Ct. at 1713.

D. The Prosecutors Did Not Violate The Fourteenth Amendment's Substantive Due Process Component Because They Were Neither Deliberately Indifferent Nor Did Their Conduct Shock The Conscience.

The touchstone of due process is protection of the individual against arbitrary action of the government or the exercise of Government power without any reasonable justification in the service of a legitimate governmental objective. See *County of Sacramento v. Lewis*, id., 118 S.Ct. at 1716. Thus, this court has consistently held that only the most egregious government conduct can be considered arbitrary in the constitutional sense. See *County of Sacramento v. Lewis*, id., 118 S.Ct. at 1716; *Collins v. Harker Heights*, id., 503 U.S. at 126-128, 112 S.Ct. at 1069-1070.

In *County of Sacramento v. Lewis*, id., 118 S.Ct. at 1717, this Court held that the substantive component of the due process clause is violated by executive action that is arbitrary, or conscience shocking, in a constitutional sense. See also *Collins v. Harker Heights*, id., 503 U.S. at 128, 112 S.Ct. at 1070 and *Rochin v. California*, 342 U.S. 165, 172-173, 72 S.Ct. 205, 209-210, 96 L.Ed. 183 (1952). For conduct to rise to the level of shocking the conscience it must at a minimum be deliberately indifferent conduct. See *County of Sacramento v. Lewis*, id., 118 S.Ct. at 1718-1720; See also *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388-89, 109 S.Ct. 1197, 1204-05, 103 L.Ed.2d 412 (1989). In *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 1979, 128 L.Ed.2d 811 (1994), this court held that deliberate indifference is where an official knows of and disregards an excessive risk of harm. Further, according to *Farmer*, to establish deliberate indifference, the official must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and he must also draw the inference.

The prosecutors did not violate the fourteenth amendment when they caused Respondent to be searched while his client was testifying before the grand jury, because they did not knowingly engage in either egregious or unlawful conduct. To illustrate, the prosecutors' caused Respondent to be searched pursuant to a valid and lawful search warrant, and when the search was initiated, Respondent did not have a constitutional right of any kind to accompany his client into the grand jury hearing room. Once the grand jury proceeding began the prosecutors allowed the witness to leave the hearing room to consult with Respondent. Moreover, each time the witness returned to the grand jury room after being excused, she invoked her fifth amendment rights, upon the advice of counsel, which led the prosecutors to believe that she had the opportunity, and had in fact consulted with Respondent.

The prosecutors were never put on notice by either the witness or Respondent that the witness did not consult with Respondent when the prosecutors excused her to do so. Consequently, in the absence of the prosecutors having either notice or knowledge of the witness' inability to consult with Respondent, and because the prosecutors did not place any restrictions on the witness when she left the hearing room to consult with Respondent, the prosecutors' conduct did not rise to the level of "shocks the conscience" nor deliberate indifference. Furthermore, since the search warrant could be executed any time between 7:00 a.m. and 10:00 p.m., and due to the absence of any statute or other independent source that somehow prohibited an attorney from being searched when his client testified before a grand jury, the prosecutors' conduct did not constitute deliberate indifference. Thus, since the prosecutors did not act with deliberate indifference nor engage in conscience shocking conduct Respondent's fourteenth amendment rights were not violated.

E. The Prosecutors Did Not Violate The Respondent's Procedural Due Process Rights Because There Were Adequate State Law Tort Remedies Available.

The two (2) essential components of a claim for a violation of procedural due process are the deprivation of a constitutionally protected interest in life, liberty or property and second, the procedural safeguards surrounding the deprivation must be inadequate. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1153-54, 71 L.Ed.2d 265 (1982); *Zinerman v. Burch*, id., 455 U.S. at 125-126, 110 S.Ct. at 983. In *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976), this court set forth the factors to weigh when determining what procedural protections the constitution requires in a particular case, by stating as follows:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

In essence, the constitution generally requires some kind of a hearing before the state deprives a person of a liberty or property interest. See *Zinerman v. Burch*, id., 494 U.S. at 127, 110 S.Ct. at 984; *Cleveland Board of Education v. Loudermill*, id., 470 U.S. at 542, 105 S.Ct. at 1493. However, the due process clause may also be satisfied where there is either a post deprivation hearing or a common law tort remedy. See *Zinerman v. Burch*, id., 494 U.S. at 128, 110 S.Ct. at 984; *Logan v. Zimmerman Brush Co.*, id., 455 U.S. at 436, 102 S.Ct. at 1158. In *Parratt v. Taylor*, 451 U.S. 527, 541, 101 S.Ct. 1908, 1916, 68 L.Ed.2d 420 (1981), this court

held that a state prisoner who had negligently been deprived of materials he had ordered by mail could not establish a claim for procedural due process because there were adequate post-deprivation state law tort remedies available to him, by stating:

"The justifications which we have found sufficient to uphold taking of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place."

In *Hudson v. Palmer*, 468 U.S. 517, 533 104 S.Ct. 3194, 3204, 82 L.Ed.2d 393 (1984), this court rejected a prisoner's procedural due process claim based upon the alleged deliberate and malicious destruction of his property, because there was a state law tort remedy available to him,⁸ by stating:

"If negligent deprivations of property do not violate the Due Process Clause because pre-deprivation process is impracticable, it follows that intentional deprivations do not violate that Clause provided, of course, that adequate state post-deprivation remedies are available. Accordingly, we hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process

⁸ The *Parratt* doctrine also applies to a liberty deprivation. See *Zinerman v. Burch*, id., 494 U.S. at 132, 110 S.Ct. at 986-87.

Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available."

The complaint filed by Respondent does not specifically allege a procedural due process claim and the Ninth Circuit's decision in *Gabbert v. Conn*, *supra*, was apparently based upon a substantive due process analysis and not a procedural due process violation. Nonetheless, in the event Respondent were to assert a procedural due process violation, it would be barred because California state law provides adequate post-deprivation state law tort remedies.

Under California law Respondent could have sued the prosecutors for negligence as a result of their decision to have him subjected to a search when his client was testifying before the grand jury. See California Government Code Sections 911.2 and 945.4. In addition, Respondent could have brought a tort action for intentional infliction of emotional distress. Also, Respondent could have pursued a tort claim under California Government Code Section 815.6, which authorizes a cause of action for breach of a mandatory duty. See *Braman v. State of California*, 28 Cal.App.4th 344, 348-349, 33 Cal. Rptr. 2d 608 (1994). Hence, since there were adequate post-deprivation tort remedies under California law the prosecutors did not violate the procedural due process component of the fourteenth amendment.

II. THE PROSECUTORS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE CAUSING THE ATTORNEY TO BE SEARCHED AT THE TIME HIS CLIENT WAS TESTIFYING BEFORE THE GRAND JURY DID NOT VIOLATE ANY CLEARLY ESTABLISHED FOURTEENTH AMENDMENT RIGHTS OF THE ATTORNEY.

According to the doctrine of qualified immunity government officials performing discretionary functions are

shielded from civil liability unless their actions violate clearly established statutory or constitutional rights of which a reasonable person would have known. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *Buckley v. Fitzsimmons*, 509 U.S. 259, 268, 113 S.Ct. 2606, 2613, 125 L.Ed.2d 209 (1993). The qualified immunity defense is designed to protect all but the plainly incompetent or those who knowingly violate the law. See *Malley v. Briggs*, 475 U.S. 335, 441, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986); *Burns v. Reed*, 500 U.S. 478, 494-495, 111 S.Ct. 1934, 1944, 114 L.Ed.2d 547 (1991).

In order for a right to be clearly established the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right. See *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). Although a plaintiff is not required to show that the very conduct in question has been held unlawful, he is however, required to demonstrate that the unlawfulness was apparent in light of clearly established law. See *Anderson v. Creighton*, *id.*, 483 U.S. at 640, 107 S.Ct. at 3039. It is especially important in the context of an alleged due process clause violation that the unlawfulness of the alleged conduct be apparent in light of legal rules that were "clearly established" at the time the conduct was taken,⁹ because in *Anderson v. Creighton*, *id.*, 483 U.S. at 639, 107 S.Ct. at 3039, this court stated:

"For example, the right to due process of law is quite clearly established by the Due Process clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test

⁹ See also *Seigert v. Gilley*, 500 U.S. 226, 231, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991).

of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." (Emphasis added)

A right is not clearly established if government officials of reasonable competence could disagree on the issue. See *Malley v. Briggs*, id., 475 U.S. at 341, 106 S.Ct. at 1096. Nonetheless, in *Gabbert v. Conn*, id., 131 F.3d at 801, n.2, the Ninth Circuit identified the right that the prosecutors allegedly violated to be interference with an attorney's ability to practice his profession. The Ninth Circuit also defined Respondent's right as the ability to freely render legal assistance to his client whenever she chose to seek his advice regarding her grand jury testimony. Although the Ninth Circuit never expressly defined the right as arising under the procedural or substantive component of the fourteenth amendment, the right can only be characterized as part of the substantive component; specifically a liberty interest, of the due process clause. See *Zinerman v. Burch*, id., 494 U.S. at 125, 110 S.Ct. at 983.

In *Gabbert v. Conn*, id., 131 F.3d at 801, the Ninth Circuit implicitly conceded that the newly created right to freely render legal assistance to a client whenever the client sought advice was not clearly established, by stating:

"The unusual facts of this case preclude the very action in question to be clearly established in our case law."

Nevertheless, the Ninth Circuit inappropriately expanded Respondent's fourteenth amendment rights by reference to the non-legal, abstract and open-ended concept of common sense. It was improper for the Ninth

Circuit to create a new and expansive fourteenth amendment right for Respondent under the guise of common sense, because for the law to be clearly established it must be so in light of existing law, instead of newly created law. See *Anderson v. Creighton*, id., 483 U.S. at 639, 107 S.Ct. at 3038.

As a general matter this court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended. See *Collins v. Harker Heights*, id., 503 U.S. at 125, 112 S.Ct. at 1068; *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-226, 106 S.Ct. 507, 513-514, 88 L.Ed.2d 523 (1985). The Ninth Circuit's decision in *Gabbert* reformulates the meaning of a person's liberty interest in occupation freedom or the right to pursue employment of one's choosing, in a manner that is both inconsistent with, and contrary to previous decisions of this court, prior Ninth Circuit authority, and past decisions of other circuits as well. Neither this Court nor any of the 12 federal circuit courts have held that a prosecutor who causes an attorney to be searched pursuant to a valid warrant, while the attorney's client is testifying before a grand jury, violates the attorney's fourteenth amendment rights. Furthermore, there is no analogous case from this court, the 12 federal circuit courts nor the district courts, that would have made it apparent to or given fair warning to a prosecutor that he violates an attorney's rights under the fourteenth amendment by causing him to be searched, pursuant to a valid warrant that can be executed any time during the day, simply because his client is testifying before the grand jury. Moreover, there was no clearly established case law from this court or the lower federal courts that made it apparent that an attorney's fourteenth amendment rights included the right to freely consult

with his client whenever the client sought his legal advice, notwithstanding the fact that the government was executing a valid search warrant on the attorney.

Since the Ninth Circuit's newly created expansion of Respondent's fourteenth amendment rights was not clearly established in light of pre-existing law in March, 1994, the Prosecutors are entitled to qualified immunity.

A. Under Pre-existing U.S. Supreme Court Authority Respondent Did Not Have A Clearly Established Right Under The Fourteenth Amendment That Prevented The Prosecutors From Causing Him To Be Searched When His Client Testified Before The Grand Jury.

A review of U.S. Supreme Court legal precedent on the right to occupational freedom or to pursue employment of one's choosing shows that as of March, 1994, this court had not ruled that the fourteenth amendment liberty interest of occupational freedom included the right of an attorney to give legal assistance to his client whenever the client sought his assistance. Moreover, there is no analogous precedent from this court that would have made it apparent to the prosecutors in March, 1994, that they violated an attorney's rights under the fourteenth amendment by causing him to be searched pursuant to a valid warrant, while the attorney's client was testifying before the grand jury. Since the attorney does not have a right to be present in the grand jury hearing room when his client testifies,¹⁰ and because previous decisions of this court have only found a violation of occupational liberty when a person is either excluded or foreclosed

¹⁰ See *U.S. v. Mandujano*, id., 425 U.S. at 581, 96 S.Ct. at 1779.

from his profession,¹¹ a reasonable prosecutor was not on notice as of March, 1994, that causing an attorney to be searched pursuant to a valid warrant was a violation of clearly established law. Further, this court has never held that the execution of a valid search warrant violates a person's right to occupational freedom, and this court has not held that a person's fourteenth amendment right to practice his profession can delay the execution of a valid search warrant.

The situation that Respondent was confronted with can be best characterized as being legally distracted or delayed from practicing his profession. For example, when Respondent was advised during the search that his client wanted to speak with him he replied that he couldn't talk to her because he was being searched and "they" would have to wait. However, the prosecutors did not know that Traci Baker failed to consult with Respondent each time they excused her to seek his assistance. The significance of this is that any reasonable prosecutor would have believed that if he or she allowed the witness to leave the grand jury room to consult with her attorney, and that upon the return of the witness she does not notify the prosecutors that she did not consult her attorney as she requested, then the witness must have consulted with her attorney as she requested. Moreover, when added to this scenario is the fact that after the witness returns to resume her testimony, she asserts her fifth amendment rights on the advice of counsel. Thus, any reasonable prosecutor would conclude that the witness had been given access to her attorney and that the attorney practiced his profession unencumbered.

The factual circumstances confronting the prosecutors in this case highlights why this court should adopt a

¹¹ See *Schwartz v. Bd. of Bar Exam of State of N.M.*, id., 353 U.S. at 238, 77 S.Ct. at 756; *Cafeteria and Restaurant Workers Union v. McElroy*, id., 367 U.S. at 896, 81 S.Ct. at 1749.

standard for what constitutes the establishment of clearly established law, whereby the law is clearly established when the issue has been decided by a factually similar or closely analogous factual case that has been decided by this court before the alleged wrongful conduct occurred. If this court were to adopt such a standard as the test for determining when clearly established law is violated, the prosecutors in this case would be entitled to qualified immunity.

Allowing the standard for determining when clearly established law exists to be where a similar or closely analogous factual case on the issue has been decided by this court would be beneficial because it would eliminate conflicts within the federal circuit courts,¹² and it would also eliminate the need for state courts to choose among conflicting circuit court decisions. To illustrate, the decisions of the Ninth Circuit are not binding on the Tenth Circuit. See *F.D.I.C. v. Daily*, 973 F.2d 1525, 1532 (10th Cir. 1992); see also *Caldwell v. Moore*, 968 F.2d 595, 599 (6th Cir. 1992) (To determine whether a right is clearly established sixth circuit generally does not rely on cases from other federal circuits) and *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1257-58 n.9 (10th Cir. 1998). Furthermore, when the federal circuits are in conflict, the authority of the Ninth Circuit is entitled to no greater weight than decisions from other circuits in Section 1983 actions brought in state courts. See *Alicia T. v. County of Los Angeles*, 222 Cal.App.3d 869, 879, 271 Cal. Rptr. 513 (1990).¹³

Hence, if this court adopts the standard for determining clearly established law which Petitioners urge herein, state courts would not have to choose between conflicting

¹² But see *United States v. Lanier*, 520 U.S. ___, 117 S.Ct. 1219, 1226-27, 137 L.Ed.2d 432 (1997).

¹³ State Courts of general jurisdiction have concurrent authority to adjudicate claims arising under 42 U.S.C. § 1983. See *Martinez v. California*, 444 U.S. 277, 283 n.7, 100 S.Ct. 553, 558 n.7, 62 L.Ed.2d 481 (1980).

federal circuit court decisions, or deciding for themselves, when the law is clearly established for the purpose of invoking qualified immunity. Therefore, without the adoption of the standard being proposed by Petitioners there will be numerous conflicting and inconsistent decisions on qualified immunity in both the federal circuit and state courts. This will be especially true in the area of fourteenth amendment substantive due process claims because the due process clause is inherently abstract and open-ended. See *Collins v. Harker Heights*, id., 503 U.S. at 125, 112 S.Ct. at 1068; *Anderson v. Creighton*, id., 483 U.S. at 639, 107 S.Ct. at 3039.

In the absence of a prior decision by this Court that the execution of a valid search warrant can violate a person's right to practice his profession or that the right to practice one's profession can be a basis for delaying or preventing the execution of a lawful search warrant, the prosecutors are entitled to qualified immunity.

B. The Law Was Not Clearly Established In The Federal Circuits In March 1994 That A Prosecutor Violates An Attorney's Fourteenth Amendment Rights By Causing Him To Be Searched When His Client Is Testifying Before The Grand Jury.

Under the federal circuit precedents as of March, 1994, a reasonable prosecutor would not have known that he violated clearly established law, in particular, the fourteenth amendment, by causing an attorney to be searched, pursuant to a valid warrant, when the attorney's client was testifying before the grand jury. Since this case arises from a Ninth Circuit decision it is appropriate to first examine Ninth Circuit authority that was available in March, 1994 to determine whether the prosecutors were on notice that their conduct violated clearly established law announced in the Ninth Circuit.

In *FDIC v. Henderson*, 940 F.2d 465, 474 (9th Cir. 1991), the plaintiff, a former bank president alleged that his substantive due process rights under the fourteenth amendment were violated because he was wrongfully discharged by a state banking official. However, the Ninth Circuit rejected the plaintiff's substantive due process claim, which was predicated on his right to pursue the occupation of his choice, because plaintiff, even though he was discharged, could still pursue a job in the banking industry, by stating:

"In order to state such a substantive due process claim [right to pursue occupation of choice] Wood must show, first, that he is unable to pursue a job in the banking profession."

In light of *Henderson*, a reasonable prosecutor would have concluded in March, 1994, that to violate an attorney's fourteenth amendment rights, his or her conduct had to exclude the attorney from the practice of law. In *Di Martini v. Ferrin*, 889 F.2d 922, 927-928 (9th Cir. 1988), a case in which the alleged wrongful conduct of government officials resulted in the plaintiff losing his job, the plaintiff made a claim for a violation of his liberty and property interest, based upon alleged officious third party interference with his private employment. The distinguishing feature between *Di Martini* and the instant case is that in *Di Martini* the plaintiff lost his job whereas here Respondent did not lose his job and continued to represent witness Traci Baker after the alleged wrongful conduct occurred. Thus, *Di Martini*, does not make it apparent to a reasonable prosecutor that subjecting an attorney to a search while his client is before the grand jury is unlawful.

In *Benigni v. City of Hemet*, 879 F.2d 473, 478 (9th Cir. 1988), the court held that a bar owner properly stated a claim for a violation of the due process clause based upon a denial of his liberty and property interest in pursuing

occupational freedom when police conduct was intentionally directed toward forcing the bar owner out of business. In contrast, here Respondent was searched pursuant to a valid warrant and the prosecutors were not intentionally trying to force Respondent out of the entire practice of law nor from the representation of his client.

In another related case, but one decided about 6 weeks after March, 1994, the Ninth Circuit in *Wedges/Ledges of California Inc. v. City of Phoenix*, 24 F.3d 56 (1994), ruled that in order to establish a substantive due process claim based upon the alleged violation of the right to engage in the occupation of one's choice, the person must be excluded from their chosen occupation. In *Wedges/Ledges*, a city banned plaintiffs from offering a particular type of amusement game, which the plaintiffs contended interfered with their ability to pursue their livelihood in the amusement game industry, but the Ninth Circuit denied plaintiffs' claim by stating at page 65, as follows:¹⁴

"As an initial matter, we note that the fact that the city temporarily banned one particular type of amusement game does not in itself establish that the city unduly interfered with either the game operators' or manufacture's ability to pursue their livelihood in the amusement game industry." (Emphasis added)

Based upon Ninth Circuit case law as of March, 1994, a reasonable prosecutor would have concluded that in order to violate an attorney's fourteenth amendment rights he had to exclude or foreclose the attorney from the practice of law. However, here, the prosecutors did not ban the attorney from the practice of law. At worst, the prosecutors, in exercising a lawful search warrant,

¹⁴ The Ninth Circuit cited as examples the cases of *FDIC v. Henderson*, *supra*, and *DiMartini v. Ferrin*, *supra*, when making its ruling.

may have inadvertently delayed or distracted Respondent from practicing law for a matter of less than 18 minutes, because Traci Baker's grand jury testimony began at 10:54 a.m. and ended at 11:12 a.m. Yet, during this time span the prosecutors excused her three times, without any restrictions, to consult with Respondent. More importantly, after Traci Baker's grand jury testimony was concluded Respondent continued his legal representation of her by acting as her counsel at the contempt proceeding.

As of March, 1994, there was nothing in Ninth Circuit case law that would have made it apparent to the prosecutors that they violated Respondent's fourteenth amendment rights by having him searched pursuant to a valid warrant when his client was testifying before the grand jury. Furthermore, there was certainly no analogous Ninth Circuit case, in terms of facts that would have made it obvious to the prosecutors that their conduct was in violation of clearly established law. Also, there was no Ninth Circuit case that made it apparent to the prosecutors that they acted arbitrarily in causing Respondent to be searched pursuant to a valid warrant, or when they granted each of Traci Baker's requests to consult with her attorney. See, e.g., *Wedges/Ledges of California, Inc. v. City of Phoenix Ariz.*, id., 24 F.3d at 66 (no fourteenth amendment violation when city's conduct was not clearly arbitrary).

A survey of the case authority from the Seventh Circuit also shows that the prosecutors did not violate the clearly established law in effect in March 1994. In *Colaizzi v. Walker*, 812 F.2d 304, 307 (7th Cir. 1987), the court held that a state violates the due process clause of the fourteenth amendment when it bans a person from a whole category of employment, because it deprives a person of occupation liberty. In *Wroblewski v. City of Washburn*, 965 F.2d 452, 455 (1992), the Seventh Circuit held that a person is not deprived of occupational liberty when he is denied a specific job, by stating:

"It is the liberty to pursue a calling or occupation, and not the right to a specific job that is secured by the fourteenth amendment."

Similarly, in *Illinois Psychological Ass'n v. Falk*, 818 F.2d 1337, 1343-1344 (7th Cir. 1987), the court held that a psychologist who was not denied his license to practice psychology, and did not have his hospital privileges revoked, was not deprived of occupational liberty because he only suffered a curtailment of his occupational freedom, which is not a deprivation of his rights. See also *Bloyer v. Peters*, 5 F.3d 1093, 1092-1093 (7th Cir. 1993).

According to Seventh Circuit precedent as of March, 1994, a reasonable prosecutor confronted with the facts and circumstances facing Petitioners on March 21, 1994, would have concluded that to violate Respondent's fourteenth amendment rights they had to either exclude Respondent from the practice of law or somehow foreclose him from obtaining legal business.

Based upon the available Seventh Circuit precedent the most analogous case to the case at bar is *Illinois Psychological Ass'n v. Falk*, id., 818 F.2d at 1343-1344, which instructs that a curtailment of occupational freedom does not constitute a deprivation of fourteenth amendment rights. In comparison, when the prosecutors caused Respondent to be searched when his client was testifying, the worst that happened to Respondent was a curtailment of his occupational freedom, but they did not **deprive** him of his liberty interest. Thus, what happened to Respondent could be characterized as a legally necessary and slight delay in practicing his profession, or in other words, a required, but temporary curtailment of his occupational freedom, which does not constitute a liberty deprivation. Consequently, in light of the state of the law in the Ninth and Seventh Circuits in March, 1994, it was neither apparent nor clearly established that the conduct

of the prosecutors was a violation of the Respondent's fourteenth amendment rights.

The result reached by the Ninth Circuit in *Gabbert v. Conn*, id., reveals why the standard for determining when the law is clearly established needs to be explained more fully by this court in its decision of this case. In Section II(A), *supra*, of this brief Petitioners proposed a test for determining whether the law was clearly established, in which the issue must have been decided by a factually similar or closely analogous factual case decided by this court. In the event this court rejects the standard for clearly established law proposed by Petitioners in Section II(A), herein, this Court should adopt as the standard for clearly established law the bright line test followed by the Eleventh Circuit. Under the bright line standard the law is only clearly established when the case law, in factual terms, has staked out a bright line. See *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993); *Rowe v. Schreiber*, 139 F.3d 1381, 1383-1384 (11th Cir. 1998). According to the bright line standard the line is not found in abstractions, but in studying how these abstractions have been applied in concrete factual circumstances. See *Post v. City of Fort Lauderdale*, id., 7 F.3d at 1557. The benefit of the bright line standard is that public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases. See *Rowe v. Schreiber*, id., 139 F.3d at 1384.

The fact specific bright line standard for determining whether the law is clearly established has been applied, in some fashion and not necessarily under the same name, by other federal circuits. See, e.g., *Cope v. Heltsley*, 128 F.3d 452, 459 (6th Cir. 1997) (specific factual context used to determine qualified immunity); *Chan v. Wodnicki*, 123 F.3d 1005, 1008 (7th Cir. 1997) (qualified immunity available unless the law was clear in relation to the specific facts confronting the public official); *Brown v. Ives*, 129 F.3d 209, 211 (1st Cir. 1997) (it is not enough that right

claimed to be violated has been recognized at an abstract level, existing case law has to give the official reason to know that the specific conduct was prohibited); *Baptiste v. J.C. Penney Co.*, id., 147 F.3d at 1255-56 (plaintiff must demonstrate a substantial correspondence between the conduct in question and prior law); *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992) (officials are not liable for bad guesses in gray areas; they are only liable for transgressing bright lines).

In contrast to the bright line standard is the Ninth Circuit's newly established "common sense" test, which does not rely on fact specific case precedent, but instead applies the abstract and elusive concept of common sense. See *Gabbert v. Conn*, id., at 801 and see also *Pro v. Donatucci*, 81 F.3d 1283, 1292 (3rd Cir. 1996) (law clearly established despite a split in circuits, as long as no gaping divide has emerged in jurisprudence such that defendants could reasonably expect this circuit to rule to the contrary).

Under the bright line standard Petitioners would be entitled to qualified immunity, because the law was not clearly established under the unique facts confronting Petitioners. See *Gabbert v. Conn*, id., 131 F.3d at 801. However, under the Ninth Circuit's "common sense" test Petitioners were denied qualified immunity. The danger posed by the common sense test is that the concept of common sense is too abstract and undefined to provide public officials with clear and well defined guidelines when they engage in discretionary functions, because what is common sense to one person may be completely different to another. Consequently, under the Ninth Circuit's standard, public officials would either have to guess what is clearly established law or be imaginative and creative when analyzing the pre-existing law from the 12 federal circuits. Moreover, under the Ninth Circuit's "common sense" analysis, plaintiffs would be able to convert the rule of qualified immunity into a rule of

virtually unqualified liability simply by alleging a violation of abstract rights; namely, common sense, which has been condemned by this court. *See, e.g., Anderson v. Creighton*, id., 483 U.S. at 639, 107 S.Ct. at 3039; *Collins v. Harker Heights*, id., 503 U.S. at 125, 112 S.Ct. at 1068 (guideposts for substantive due process are scarce and open-ended).

Another problem posed by the "common sense" test is that virtually any distraction or delay the state imposes on a person engaged in the practice of their profession, regardless of the nature of interruption or justification for it, would constitute a violation of clearly established law. For example, under *Gabbert v. Conn*, id., anytime government officials delayed or distracted an attorney in practicing law, regardless of the reason or justification for the delay, or the length of the interruption, the official would be in violation of clearly established law. Consequently, whenever a person was pursuing his occupation or engaged in work, government officials would never be entitled to qualified immunity, which would eliminate the qualified immunity defense in an entire category of cases. In addition, Government officials would be reluctant to engage in even lawful conduct, such as executing a valid search warrant, out of fear of being sued for violating the fourteenth amendment.

The bright line standard is the proper and better approach than the Ninth Circuit's "common sense" test, because the bright line standard preserves the principal purpose of the qualified immunity defense, which is to provide protection to all but the plainly incompetent or those who knowingly violate the law. *See Malley v. Briggs*, id., 475 U.S. at 341, 106 S.Ct. at 1096. It also furthers the goal of protecting government officials from undue interference with their duties and from potentially disabling threats of liability. *See Harlow v. Fitzgerald*, id., 457 U.S. at

807, 102 S.Ct. at 2732. Lastly, it allows government officials to exercise and perform their discretionary duties without being unduly second guessed.

Since there are no cases from any of the 12 federal circuit courts that have held that an attorney's fourteenth amendment right to practice his profession free from governmental interference can delay or preclude the execution of a valid search warrant on the attorney when his client is testifying before a grand jury, or when the attorney is advising his client, the Petitioners did not violate any clearly established law that was apparent to a reasonable prosecutor. Further, the absence of an analogous case from the federal circuit courts on the question of whether the execution of a valid search warrant, that can be executed any time between 7:00 a.m. and 10:00 p.m., can deprive a person of his fourteenth amendment right to practice his profession entitles the prosecutors to qualified immunity.

C. The Extent Of An Attorney's Fourteenth Amendment Rights Were Not Clearly Established By The District Court Decision Of *Keker v. Procunier*.

In *Keker v. Procunier*, 398 F.Supp. 756, 761-763 (E.D. Cal. 1975), the Court observed that prison officials interfered with an attorney's right to practice his profession if the attorneys were forced to meet their clients in an uncomfortably hot room when other more amenable facilities are reasonably available, and if communication between attorney and client is circumscribed by partitions, limited by telephone restrictions and subject to continual surveillance. A reasonable prosecutor who had read or was aware of the *Keker* decision in March, 1994, and was faced with the same factual circumstances as

Petitioners, would not have known that causing Respondent to be searched while his client was before the grand jury violated clearly established law for several reasons.

First, Respondent did not have a constitutional right to be present with his client in the grand jury room, and when his client asked permission to consult with him, the witness was excused from the grand jury room and no restrictions were placed on either the witness or Respondent when the witness was excused. Further, the search of Respondent was pursuant to a valid warrant that could be executed any time during business hours, and the search lasted only a matter of minutes and it occurred in a private room. Also, there was nothing to prevent Respondent from merely waiting until after the search to consult with his client. Furthermore, the prosecutors, once they excused the witness to consult with Respondent were never notified or advised that the witness had not consulted freely with Respondent.

Another reason why the case of *Keker v. Procunier*, id., should not be the basis for a finding that the Petitioners violated clearly established law is the fact that it is only a district court decision. Generally, for the law to be clearly established it must be done by way of a decision by this court, a Federal Circuit Court of Appeal or a state supreme court. See, e.g., *Baptiste v. J.C. Penney Co.*, id., 147 F.3d at 1257, n.9; *Cope v. Heltsley*, id., 128 F.3d at 459, n.4; *Wilson v. Lane*, 141 F.3d 111, 114 (4th Cir. 1998); *Jenkins By Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir. 1997). Consequently, a single district court decision, which is distinguishable on its facts from the case at bar, is insufficient to clearly establish that a reasonable prosecutor should have known that Respondent could not be subjected to a search once his client was before the grand jury.

The problem posed by allowing a district court decision to be the basis for establishing clearly established law is that with 12 federal circuits and 50 state supreme

courts, requiring prosecutors to be familiar with the numerous district court decisions as well as the federal circuit and state supreme court opinions places a tremendous and overwhelming legal research burden and responsibility on prosecutors. For example, the *Keker v. Procunier*, id., case is one of a kind and nearly 20 years old as of March, 1994, and it is highly unlikely that in March, 1994, a local county prosecutor would be familiar with the rulings articulated in *Keker*. Therefore, it is doubtful that the unique and sole case of *Keker* was known to or even read by local Prosecutors because they specialize in criminal law and not federal civil rights claims arising under the due process clause of the fourteenth amendment.

In the event this court finds that a single district court decision is insufficient to show that the law is clearly established, which is the approach generally taken by the federal circuit courts, the prosecutors would be entitled to qualified immunity. On the other hand, if this court concludes that the law can be clearly established on the basis of a single district court decision that has not been tested by a Court of Appeal, the prosecutors are still entitled to qualified immunity because *Keker v. Procunier*, id., does not stand for the proposition that an attorney's fourteenth amendment right to practice his profession is cause to delay or prevent the execution of a valid search warrant.

CONCLUSION

For the reasons hereinabove stated, Petitioners David Conn and Carol Najera pray that the decision below from the U.S. Court of Appeals for the Ninth Circuit, finding that Petitioners deprived Respondent of his fourteenth amendment rights and that Petitioners were not entitled to qualified immunity, be reversed and that Petitioners be awarded their costs.

Dated: November 18, 1998

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In The
Supreme Court of the United States
October Term, 1998

DAVID CONN and CAROL NAJERA,
Petitioners,
vs.

PAUL L. GABBERT,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

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QUESTIONS PRESENTED

1. THE RESPONDENT LAWYER REPRESENTED A CLIENT SUBPOENAED TO TESTIFY BEFORE AND PRODUCE INCRIMINATING DOCUMENTS TO A GRAND JURY INVESTIGATING THE CLIENT AS ITS TARGET. THE PETITIONER PROSECUTORS, INTENDING TO GET AN UNFAIR ADVANTAGE OVER THE CLIENT, UNNECESSARILY AND INTENTIONALLY PRECLUDED THE RESPONDENT FROM GIVING HER ADVICE AND COUNSEL AFTER SHE HAD BEEN ALLOWED TO LEAVE THE GRAND JURY ROOM TO DO SO (FOLLOWING QUESTIONING BY THE PETITIONERS). DID THIS CONDUCT VIOLATE THE RESPONDENT'S DUE PROCESS RIGHTS TO GIVE ADVICE TO HIS CLIENT IN THE PRACTICE OF HIS PROFESSION?
2. WERE RESPONDENT'S DUE PROCESS RIGHTS TO GIVE ADVICE TO HIS CLIENT IN THE PRACTICE OF HIS PROFESSION, WHILE HIS CLIENT WAS APPEARING AS A WITNESS BEFORE A GRAND JURY INVESTIGATING THE CLIENT AS ITS TARGET, CLEARLY ESTABLISHED IN MARCH OF 1994?

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STATEMENT OF THE CASE

A. INTRODUCTION

This case involves a criminal defense lawyer who represented a grand jury witness, a young woman who was a target of a grand jury investigation and who retained the lawyer for representation in that matter, and two local prosecutors who, intent on gaining an advantage over the young woman, prevented her from obtaining advice from her lawyer so that they could more readily obtain incriminating evidence, testimony, and documents from her. The core issue is a narrow one: Does a lawyer who has been hired to represent a client who is the target of a grand jury perjury investigation have a right to give advice to that client (sought outside the grand jury room) free from unnecessary interference by the investigating prosecutors. The rule Respondent seeks from this Court is equally narrow: that the Due Process Clause protects the ability of a lawyer to provide advice and counsel to a client who is a target of a grand jury investigation free from unnecessary interference by prosecutors whose intention was to take advantage of the uncounselled client in order to obtain incriminating evidence.

B. STATEMENT OF PROCEEDINGS

Paul L. Gabbert ("Gabbert"), a criminal defense lawyer, filed a civil rights suit under 42 U.S.C. § 1983. Gabbert's claims arose out of his representation of Traci Baker ("Baker"), a young waitress who had become a "target"¹ of a high-profile, grand jury investigation and who had been subpoenaed to produce testimony and documents

¹ The Department of Justice defines a "target" as "a person to whom the prosecution or grand jury has substantial evidence linking him/her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." 7 Dept. of Justice Manual § 9-11.150 (1992-1 Supp.).

before that very same grand jury. The complaint detailed an extended course of conduct by which two Los Angeles Deputy District Attorneys, Petitioners David Conn ("Conn") and Carol Najera ("Najera"), through their direction and oversight of the actions of others as well as their own direct participation, intruded into, interfered with, and obstructed the attorney-client relationship between Gabbert and Baker. As alleged, the conduct of which Gabbert complained culminated in the execution of a search warrant for Gabbert's person which the two prosecutors had deliberately timed to coincide with Baker's appearance before the grand jury; the prosecutors' objectives were to separate Gabbert and Baker and to prevent Gabbert from providing any meaningful legal counsel to his client. It was alleged that the two prosecutors acted intentionally in order to obtain an advantage over the unsophisticated Baker and to elicit incriminating testimony from her.

Gabbert pleaded two claims for relief. The first alleged violations of the Fourth Amendment. (1 J.A. 22.) The bases for this claim were, among others, that the first search of Gabbert was conducted by a "special master," Elliot Oppenheim ("Oppenheim"), pursuant to a warrant that was unreasonably broad and had been issued on the basis of an affidavit that contained material misstatements and omissions of fact. (1 J.A. 22-23.)² The Fourth Amendment claim was also based on the fact that a second search of Gabbert, conducted by Petitioner Conn and Beverly Hills Police Department Detective Leslie Zoeller ("Zoeller"), was warrantless. (1 J.A. 22.) The second cause of action alleged a violation of the Fourteenth Amendment, asserting, among other things, that Conn and Najera violated Gabbert's substantive due process rights by arbitrarily and unlawfully interfering with his rights to communicate with and counsel his client. (1 J.A.

² See notes 7 and 8, *infra*, and accompanying text.

24-25.) Gabbert's substantive due process claim was predicated on the entire course of conduct undertaken by the two prosecutors in their investigation of Baker and their intentional interference with Gabbert's representation of Baker. (1 J.A. 24-26.) That conduct included: 1) the prosecutors' questioning of Baker at her home, knowing that she was represented by counsel and that he was not present; 2) the failure to follow lawful procedures when searching Gabbert; and 3) the execution of the warrant in a manner designed to separate Gabbert from Baker. (1 J.A. 25-26.) As alleged in the complaint, it was the totality of the prosecutors' conduct, including the unlawfulness of the search itself, that effected the violation of Gabbert's constitutional rights.³

The district court dismissed Gabbert's Fourth Amendment claims pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The court denied the defendants' motion to dismiss as to the substantive due process claim, determining, however, that the only aspect of the prosecutors' conduct which stated a

³ Amicus for Petitioners argues erroneously that, pursuant to *Albright v. Oliver*, 510 U.S. 266 (1994), Gabbert's second claim should have been brought under the Fourth Amendment, not the Fourteenth Amendment. To begin with, Gabbert's lawsuit is predicated on violations of both the Fourth and Fourteenth Amendments. (1 J.A. 22, 24.) Moreover, where as here, the wrongful conduct implicates more than one constitutional provision, the plaintiff is not required to choose between constitutional theories. As this Court has stated, "[c]ertain wrongs can affect more than a single right, and, accordingly, can implicate more than one of the Constitution's commands." *Soldal v. Cook County, Ill.*, 506 U.S. 56, 70 (1992). In such a situation, the "proper question is not which Amendment controls but whether either Amendment has been violated." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 51 (1993) (acknowledging that the Fourth Amendment is not the "beginning and end of constitutional inquiry whenever a seizure occurs").

constitutional violation was the claim that the timing of the execution of the warrant interfered with Gabbert's right and ability to practice his profession. (App. B to Pet. for Writ of Cert., p. 18.) Subsequently, the court granted summary judgment with respect to this claim on qualified immunity grounds. (App. D to Pet. for Writ of Cert., p. 11.)

The Ninth Circuit reversed in part, holding that Gabbert had alleged a violation of a clearly established substantive due process right: local prosecutors violate an attorney's Fourteenth Amendment right when they unduly and unreasonably interfere with the attorney's right to practice his profession by preventing the attorney from providing meaningful and timely legal assistance to the client in the very matter and at the very moment for which the lawyer was retained. The unreasonable interference, according to the court, was the prosecutors' deliberate conduct which was intended to, and did, prevent Gabbert from communicating and consulting with his client. The Court further held that Conn⁴ and Zoeller⁵ had violated Gabbert's Fourth Amendment rights in conducting the second search. (App. A to Pet. for Writ of Cert., pp. 23-24.)

C. STATEMENT OF FACTS⁶

At issue in this case is what ordinarily would be seen as a commonplace, but important, occurrence in the daily

⁴ The Fourth Amendment claim as to Conn has not been challenged by Petitioners in this Court. It remains pending in the district court.

⁵ Detective Zoeller was initially a defendant in the civil rights action. Gabbert and Zoeller entered into a settlement agreement and Zoeller was dismissed from the lawsuit on June 23, 1998. (Cent. Dist. Docket Entry No. 78.)

⁶ The contours of the "facts" of this case, given its procedural posture, are shaped in substantial part by well-

routine of an experienced criminal defense attorney: the representation of a target of an ongoing grand jury

recognized rules governing appellate review. As noted above, some of Respondent's claims were dismissed by the district court upon Petitioners' 12(b)(6) motion for failure to state a claim upon which relief may be granted, while others were the subject of summary judgment entered by the district court in favor of Petitioners. As to the dismissed claims, on review, the court and the parties are to presume all factual allegations of the complaint to be true and to draw all reasonable inferences in favor of the non-moving party (here, Respondent). *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (CA9 1987). Since Petitioners' summary judgment motion below was granted, Respondent's evidence (that is, the evidence of the non-moving party) is to be believed; Respondent's version of any disputed issue of fact is presumed correct; and all justifiable inferences are to be drawn in Respondent's favor. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 457 (1992); see also *Addickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

Petitioners ignore these well-established strictures and, in their brief, with nary a citation to the record, present a self-serving version of the "facts" which is styled as a "summary of the evidence." See Pet'r Br., pp. 4-8. Petitioners' so-called evidentiary summary can be fairly characterized as their contentions of fact and should not be confused with the "facts." Particularly disturbing is Petitioners' repeated, and highly misleading, reference to Petitioners' purported mental states after they had successfully separated Gabbert from his client. See, e.g., Pet'r Br. at p.7 ("the prosecutors were led to believe that she had consulted with Respondent;" "... which further led the Petitioners to believe that she had consulted with Respondent;" and "[t]his response convinced the prosecutors that she had consulted with Respondent") and p.8 ("Traci Baker's last response further assured the prosecutors that she had once again consulted with Respondent"). Again, not a single citation to the record is given. In truth, Petitioners' factual assertions find no support in the complaint's allegations; were not included within the facts offered by Respondent, the non-moving party below; and cannot be justifiably or reasonably

investigation who, without immunity, has been compelled, by subpoena, to appear before a local grand jury to testify and to produce incriminating documentary evidence. The respective roles, duties, obligations, and rights of the prosecutors, government investigators, defense counsel, and the witness or target of the inquiry, in this context, are well-settled. The factual setting presented here, however, is anything but ordinary. The sensational historical context in which this case arises – the murder trial of Erik and Lyle Menendez – is, of course, fortuitous. By contrast, the calculated, deliberate efforts undertaken to thwart defense counsel's ability to discharge his professional obligations to his client by two Los Angeles prosecutors are not. Nonetheless, the application of clearly established constitutional rules – even in this aberrant setting – remain constant.

This matter arises out of Respondent Paul L. Gabbert's representation of Traci Baker, a young waitress who had been called as a defense witness in the high-profile murder trial of Erik and Lyle Menendez. The first Menendez trial resulted in a hung jury. After that trial, Petitioners David Conn and Carol Najera, both Los Angeles County Deputy District Attorneys, newly assigned to retry the case, received information that Baker was in possession of a letter, written to her by her former boyfriend, Lyle Menendez. Petitioners believed that, in this letter, Menendez instructed Baker to testify falsely at his trial. As the following events reveal, Conn and Najera

inferred from any of Respondent's facts. At the least, Petitioners' factual assertions should have been clearly labeled as "contentions." Given the procedural posture of the case, Petitioners' contentions are of no relevance to any issues under review in this Court. Of course, upon a trial below (where the Fourth Amendment claim is pending), it will be for the jury to determine which contentions are indeed facts.

were determined, by whatever means available, to obtain this letter and to "win" the second trial of Erik and Lyle Menendez. See Steve Proffitt, *Gilbert Garcetti: In Hot Seat as L.A. District Attorney*, L.A. Times, March 13, 1994, at M3; Ted Rohrlich, *High Profile Losses Tarnish Reputation of District Attorney's Office: Prosecutors Win Most Cases, But Failures Like Menendez & McMartin Invite Criticism of Tactics*, L.A. Times, March 6, 1994, at A1.

Baker retained Gabbert in early February of 1994 to represent her in connection with the District Attorneys' investigation regarding her testimony in the first trial. (1 J.A. 9 ¶ 15.) Shortly thereafter, Gabbert was contacted by Leslie Zoeller, a Beverly Hills Police Department Detective, who indicated that he and the District Attorney's office sought Baker's cooperation in the anticipated retrial of Lyle Menendez. Subsequent to his initial contact with Zoeller, Gabbert received additional telephone calls from the detective regarding Baker's participation in the Menendez investigation. (1 J.A. 10 ¶ 16.)

Between approximately February and March 15, 1994, Gabbert also received several telephone calls from Conn. (1 J.A. 10 ¶ 17; Appendix G, pp. 2-3; Appendix E, pp. 3-5.) Conn understood that Gabbert had been retained to represent Baker in connection with the Menendez investigation. (1 J.A. 10 ¶ 17; Appendix G, pp. 2-3; Appendix E, pp. 2-3.) During one of these telephone conversations, Conn advised Gabbert that Baker was a "target" of the grand jury investigation and asked Gabbert if she would voluntarily cooperate in the investigation. When Gabbert indicated that he could not respond to his question at that time, Conn requested that Gabbert make Baker available for the service of a grand jury subpoena. It was agreed that Zoeller would serve the subpoena at Gabbert's law office on March 17 at 12:00 noon. (1 J.A. 10 ¶ 17; Appendix E, pp. 3-5.)

Subsequent to, and despite, the agreement with respect to service of the subpoena, in approximately the third week of February, Zoeller and another Beverly Hills

Police Department officer, Stephanie Miller, appeared unannounced at Baker's home at approximately 8:30 p.m. Although Zoeller knew Baker was represented by Gabbert and that he was not present, Zoeller attempted to question Baker about "the letter." (1 J.A. 11 ¶ 18; Appendix D, pp. 10-11.) Having failed in his attempt to obtain "new" information directly from Baker, Zoeller appeared at Gabbert's office to serve Gabbert with the grand jury subpoena for Baker. (1 J.A. 11 ¶ 19; Appendix G, pp. 3-5.) The subpoena commanded Baker's appearance before the grand jury on March 21 and also ordered her to produce any correspondence between Lyle Menendez and her. (1 J.A. 11 ¶ 20; 1 J.A. 31.) Because the subpoena's request for the production of documents potentially implicated Baker's Fifth Amendment right against compulsory self-incrimination, Gabbert immediately began to prepare a motion to quash the subpoena. (*Id.*)

On Friday morning, March 18, Gabbert telephoned Conn and advised him of the constitutional basis for the motion to quash and requested that Conn continue Baker's grand jury appearance one week so that the motion could be litigated fully and fairly prior to Baker's grand jury appearance. Conn refused. (1 J.A. 11-12 ¶ 21; Appendix E, pp. 5-7.) Gabbert also asked Conn if he would stipulate to the issuance of an order shortening time so that the motion could be heard prior to Baker's appearance on the following Monday. Conn refused this request as well. (1 J.A. 12 ¶ 22; Appendix E, pp. 5-7.) That afternoon, Gabbert attempted to file the motion to quash with the Los Angeles Superior Court. His *ex parte* application for an order shortening time was denied and the Court declined to accept the motion for filing. (1 J.A. 12 ¶ 23.)

At approximately 8:15 on the evening of Friday, March 18, aware that Gabbert had been unable to file the motion to quash and that Baker would therefore be appearing before the grand jury on the following Monday, Conn, Najera, Zoeller and Miller appeared at Baker's

home in Orange County with a search warrant for all correspondence between Baker and Menendez, as well as any other evidence which would establish a relationship between Baker and Menendez. (1 J.A. 12 ¶ 24; 1 J.A. 34, 48; Appendix D, pp. 2-5; Appendix J, pp. 2-5.)

Upon the arrival of the prosecutors and police at her home, Baker attempted to contact Gabbert by telephone to seek his assistance. (1 J.A. 13 ¶ 26.) She was not able to reach him. Despite the fact that they were aware that Baker was a target of a criminal investigation, that she was represented by counsel, and that she desired to speak with counsel, but was unable to, Conn, Najera and Zoeller also attempted to elicit statements from Baker regarding the correspondence they sought. (1 J.A. 13 ¶ 26; Appendix J, pp. 5-8.) Conn also asked Baker several questions about her relationship with Gabbert. (1 J.A. 13 ¶ 26; Appendix D, pp. 8-9.) Conn and Najera, assisted by Zoeller and Miller, personally searched Baker's home for approximately one and one-half hours, seizing, among other things, correspondence from Baker's former attorney and a typed report of an interview of Baker by that attorney. (1 J.A. 12-13 ¶¶ 24-25; 1 J.A. 48-49; Appendix D, pp. 5-8; Appendix J, pp. 4-6.) The letter was not found. On the Monday morning of Baker's grand jury appearance, Conn and Najera redoubled their efforts to obtain it and other information from Baker.

At 8:30 a.m. on Monday morning, March 21, Baker, accompanied by Gabbert, checked in with the grand jury bailiff for her scheduled appearance. (1 J.A. 14 ¶ 28; 2 J.A. 368, 425-426.) Waiting in the hallway outside the grand jury room, Gabbert and Baker were approached by Conn and Najera who proceeded to engage Gabbert in a discussion regarding a possible grant of immunity for Baker which would have allowed her to testify free of the risk that her testimony could be used to prosecute her. The four went to Conn's office, purportedly to discuss further the prospect of a grant of immunity. (1 J.A. 14-15

¶¶ 29-30; 2 J.A. 457-459, 427-431.) Based on his conversations with Conn and Najera that morning, Gabbert believed that Conn would prepare a draft letter of immunity for Baker. (1 J.A. 15 ¶ 31; 2 J.A. 430-431.)

Gabbert and Baker returned to the grand jury area to wait for Conn and Najera to bring the immunity letter. (1 J.A. 15 ¶¶ 32-33; 2 J.A. 432-433.) However, instead of preparing the letter, as Conn had led Gabbert to believe, Conn and Najera had applied for and obtained search warrants for the person and effects of both Gabbert and Baker. (1 J.A. 16 ¶ 34(b); 3 J.A. 495-499.) In fact, unknown to Gabbert and Baker, Conn had already decided to obtain the warrants at the time they were in his office discussing the immunity issue and had planned that the warrant for Gabbert would be executed as Baker was summoned into the grand jury room to commence her scheduled testimony. (3 J.A. 492, 495-497.)

While obtaining the warrant for Gabbert, the prosecutors also selected a special master, Elliot Oppenheim,⁷ to execute the warrant on Gabbert, as required by California law.⁸ (1 J.A. 16-17 ¶¶ 34-35; Appendix E, pp. 8-9.) The

⁷ The special master selected, Elliot Oppenheim, had virtually no experience in criminal matters. A solo practitioner his entire career he had recently retired after approximately 55 years of practice. The last criminal case he handled was a misdemeanor in approximately 1939. (3 J.A. 572-573.) Prior to searching Gabbert, he had conducted two searches as a special master in the preceding ten years – both on doctors' offices. (Appendix I, pp. 2-4.)

⁸ Pursuant to California Penal Code § 1524, a special master is required for the search of a non-target attorney. That statute contains strict, mandatory safeguards. Section 1524(c)(1) provides that at the time of "service of the warrant, the special master shall inform the party served of the specific items being sought and [] the party shall have the opportunity to provide the items requested." Section 1524(c)(2) provides that, if an attorney served with a warrant states that an "item or items

prosecutors gave no instruction to Oppenheim as to the mandatory procedures for searching an attorney under California law and Oppenheim had no independent knowledge of the statutory requirements. (Pet'r Br., p.21 n.5; Appendix I, pp. 5-7.) Indeed, Oppenheim believed, quite erroneously, that his only obligation as a special master under the statutory scheme in question was to advise the person being searched of his Fifth Amendment right against self-incrimination and the prosecutors did not disabuse him of that notion. (Appendix I, pp. 5-7; Appendix E, pp. 16-19; Pet'r Br., p.21 n.5.)

Upon returning to the grand jury area, Conn and Najera stood by and watched Detective Zoeller serve Gabbert with the warrant. They also watched as Oppenheim took Gabbert into a separate room to begin the search. (1 J.A. 16 ¶ 34(c); 1 J.A. 17 ¶ 36.) As that search was in progress, which necessarily caused Gabbert to be removed and separated from his client, Conn and Najera entered the grand jury room; shortly thereafter Baker was called as a witness. (1 J.A. 17 ¶¶ 36-37.)

As Oppenheim began to search Gabbert's briefcase and files, Gabbert repeatedly objected on the grounds that his belongings contained attorney work-product and attorney-client privileged information. (1 J.A. 18 ¶ 39; 2 J.A. 436; Appendix G, pp. 10-12.) Moreover, he produced to Oppenheim the only materials in his possession that were arguably within the scope of the warrant – two pages of a three-page letter to Baker from Menendez. (1

should not be disclosed, they shall be sealed by the special master and taken to court for a hearing." Section 1524(e) further provides that a special master may permit the party serving the warrant (here Detective Zoeller) to accompany the special master as he or she conducts the search. However, that party "shall not participate in the search nor shall he or she examine any of the items being searched by the special master except upon agreement of the party upon whom the warrant has been served."

J.A. 18 ¶¶ 39-40; 2 J.A. 436.) Pursuant to the explicit terms of section 1524(c)(1) of the California Penal Code, the search should have terminated once Gabbert produced this item. Oppenheim ignored Gabbert's objections and searched through the following items:

- a) an attorney-client correspondence and document file as to Baker, including several pages of handwritten notes of Gabbert's interview of this client;
- b) two files of other clients containing privileged attorney-client and work-product materials;
- c) Gabbert's calendar, containing extensive handwritten entries and notes including a list of past and present client names, addresses, and telephone numbers, as well as personal information;
- d) a leather pocketbook/wallet;
- e) a Dictaphone;
- f) an eye glass case; and
- g) a tablet of paper containing, among other things, a list of "things to do" and a list of client names and corresponding information which revealed the client's billing status.

(1 J.A. 18-19 ¶¶ 39-41; 2 J.A. 346-347, 436.) Although Gabbert continued to object on privilege grounds, Oppenheim unlawfully read the contents of each file, including the notes of Gabbert's interview of Baker. (1 J.A. 18-19 ¶¶ 39-42; 2 J.A. 346-347, 436; Appendix G, pp. 10-12.) Moreover, Oppenheim questioned Gabbert about his fee arrangement with Baker, asked Gabbert for his home address, and crudely commented about personal information he found in Gabbert's calendar which related to Gabbert's fiancé. (1 J.A. 19-20 ¶ 42; Appendix G, pp. 9-10.)

Moments before Zoeller served the warrant on Gabbert, Conn asked Gabbert, in his client's presence,

whether, if a determination to arrest Baker was made, Gabbert would surrender Baker in Los Angeles or whether she would have to be arrested in Orange County. (1 J.A. 15 ¶ 32; 2 J.A. 457-458.) Overhearing this conversation, Baker, already apprehensive due to the inherently intimidating nature of the grand jury, became unnerved. (2 J.A. 457-458.) On the heels of this conversation, she watched as her attorney, surrounded by law enforcement officials, was literally taken away. (2 J.A. 459-460.) She described her state of mind as follows, indicating her belief from the conversation that had just taken place that her arrest might be imminent:

Mr. Conn made a statement in my presence, would I submit to arrest in the hallway, or would I have to be arrested in Orange County. From that point on, I was super scared because I really thought I was going to be arrested. Then, we're expecting, I think, to have an immunity thing brought down. Instead, suddenly there's a search warrant. My attorney is taken away from me. And I was shaking, really upset, I don't know what to do. I just know I'm going to go into a room with a bunch of people I don't know that are going to ask me questions, and I don't know that are going to ask me questions, and I don't know what I should say. So I come out looking for the only rock that I have for help, and he wasn't there. So I'm stuck with some bailiff guy and nobody sitting there. I'm not saying that to be dramatic. That is exactly how I felt.

(2 J.A. 476.)

The first question Najera asked Baker before the grand jury was: "Miss Baker, are you acquainted with the defendant Lyle Menendez?" Baker responded: "At this time, I wasn't able to speak with my attorney. He's still with the special master." She then asked for an additional

opportunity to consult with Gabbert. (3 J.A. 610.) Baker was permitted to leave the room and the two Deputy District Attorneys followed her out. (3 J.A. 611.)

When Baker left the grand jury room, Gabbert was not in the waiting area as Baker had anticipated he would be. (2 J.A. 461.) Baker saw Patti Jo Fairbanks, a legal assistant in the District Attorney's office, and asked for her to help in finding Gabbert. (2 J.A. 461-462; 3 J.A. 580; Appendix F, pp. 2-6.) Fairbanks located Gabbert and Oppenheim in the private room where Gabbert was being searched. (2 J.A. 461-462; 3 J.A. 580.) Gabbert was attempting to prevent the disclosure of attorney-client privileged materials. (1 J.A. 18 ¶ 39; 2 J.A. 436; Appendix G, pp. 10-12.) Even though he had already provided Oppenheim with the only responsive documents in his possession, namely two pages of the three-page letter from Menendez to Baker,⁹ Oppenheim nonetheless continued to search Gabbert's files. (1 J.A. 18-19 ¶¶ 39-42; 2 J.A. 436.) Oppenheim read Gabbert's attorney-client privileged file as to Baker and even attempted to photocopy Gabbert's handwritten notes of his interview with Baker. (1 J.A. 18 ¶ 40; 2 J.A. 346-347, 436; Appendix G, pp. 10-12.)

Had Oppenheim followed statutory procedure, the search would have terminated when Gabbert produced the two pages of the Menendez letter. In further violation of section 1524, Oppenheim continued the search after Gabbert invoked the attorney-client privilege. Because Oppenheim failed to follow the law, Gabbert was required to focus on preventing the disclosure of privileged information. He could not simultaneously assist Baker. Thus, when Fairbanks told Gabbert that Baker

⁹ Despite the fact that Gabbert gave to Oppenheim the two-page fragment of the Menendez letter, it does not appear on the search warrant return. (1 J.A. 18 ¶ 39; 1 J.A. 48-49; 2 J.A. 436.)

wanted to speak with him, he informed Fairbanks that, realistically, he could not speak with Baker at that moment. (2 J.A. 438.) When Fairbanks replied that Baker had to return to the grand jury room, Gabbert asked that the proceedings be delayed. As Gabbert testified, "And I said, in effect 'That's tough. They created this situation. They can wait as long as it takes.' " (*Id.*) Unknown to Gabbert, his request was denied and Baker was commanded by the bailiff to return to the grand jury room. (2 J.A. 466-467.)

As she returned, Baker was distressed and upset. Although she had been unable to speak with Gabbert, she guessed that it was appropriate to assert her Fifth Amendment right against compulsory self-incrimination, based on Gabbert's "body language" which she had viewed from the hallway. (2 J.A. 462, 465.) She read the invocation from a prepared card she had brought with her in the event Gabbert advised her to assert her right against self-incrimination in response to a particular question. (2 J.A. 467-468.) She was now in an even greater state of agitation, not knowing whether she had responded appropriately to the previous question and unsure how to respond to the next. (2 J.A. 469.)

Despite the fact that Baker was unable to confer with Gabbert,¹⁰ Najera continued her questioning of Baker.

¹⁰ Relying on Supreme Court Rule 15.2, *amicus* for Petitioners contends that Gabbert, in opposing the writ petition, did not dispute Petitioners' assertion that the prosecutors did not know Baker had not been able to consult with Gabbert and, as a result, has somehow waived the ability to dispute this fact now. (*Br. Amicus Curiae* in Supp. of Pet'rs, p.3 n.2.) *Amicus* is incorrect.

Rule 15.2 addresses the Court's discretion to ignore newly-asserted or newly-contested facts which, even though relevant on the issue of whether *certiorari* should be granted, are not explicitly addressed until the filing of the briefs on the merits.

Baker again requested an opportunity to confer with her attorney. (2 J.A. 467-469; 3 J.A. 611-612.) Gabbert still was not available, because Oppenheim's search continued.

The rule embodies the general proposition that the Court may choose not to reconsider a grant of *certiorari* on the basis of a factual assertion which was not presented in timely fashion. Here, the purported fact in question – that, allegedly, the two prosecutors did not know that Baker could not consult with Gabbert on the occasions when she was allowed to exit the grand jury room – whether true or false was wholly immaterial on the question of whether *certiorari* should be granted. Even if true, the asserted fact would signify only that the two prosecutors had not known, at that time, of the success or failure of their plan to separate Gabbert and Baker and to prevent Baker from receiving Gabbert's counsel. Thus, Rule 15.2 has no application here.

Moreover, the allegations of Respondent's complaint, the facts offered by him in opposition to the summary judgment motion below, and all the inferences drawn therefrom, as adduced below and as summarized in Respondent's Brief in Opposition to the Petition for a Writ of *Certiorari*, contradict Petitioners' self-serving assertion. Indeed, Respondent contends that Petitioner acted deliberately and intentionally in thwarting Gabbert's efforts to advise and counsel his client. Those allegations, evidence and inferences – all of which are presumed true, *see* n.6, *infra* – include: (1) Petitioners deliberately caused the warrant to be executed on Gabbert's person at the time Baker was entering the grand jury room; (2) Petitioners refused to delay either the search of Gabbert or Baker's appearance, in order to gain an advantage over Baker; (3) at the commencement of Baker's appearance before the grand jury, Baker explicitly stated that her lawyer was unavailable due to the conduct of the search; (4) moments later, when Baker exited the grand jury room for the purpose of conferring with counsel, both prosecutors followed her into the hallway where they should have been able to observe, as did Patti Jo Fairbanks, a legal assistant in Conn's office, that Gabbert was not available for consultation and, in fact, was still being searched; and (5) Oppenheim did not report to Conn that the search had been completed until Baker's third excused departure from the grand jury room.

Baker was ordered back before the grand jury. Not knowing what else to do, she again read from her prepared card. In response to a third question, Baker once more sought leave to confer with her attorney. (2 J.A. 469-470; 3 J.A. 612-613.) Upon leaving the grand jury room on this occasion, Baker was confronted by another person – Detective Zoeller – searching Gabbert. (2 J.A. 470-471.) Because Oppenheim had erroneously advised the prosecutors that Gabbert's files did not contain privileged documents, Conn directed Zoeller to conduct an additional search of Gabbert. (1 J.A. 20 ¶ 44; 2 J.A. 442; 3 J.A. 510-515.) During the break in the grand jury proceedings, Conn joined in this search. (1 J.A. 20-21 ¶¶ 44-45; 2 J.A. 442; 3 J.A. 515-516.)

Shortly thereafter, because Baker had failed to provide the testimony and documents sought by the prosecutors, contempt proceedings were initiated and the grand jury foreperson announced: "Miss Baker, I declare you to be in contempt of this grand jury." (3 J.A. 616.) Baker was taken before the Los Angeles County Superior Court, Florence-Marie Cooper, Judge of the Superior Court presiding, for a hearing on the contempt citation. (3 J.A. 618.) Judge Cooper observed that the grand jury subpoena directed to Baker "raises privilege [issues] and that probably the Fifth Amendment applies and that [Baker] would be entitled to a grant of immunity before she could be compelled to produce these documents." (3 J.A. 640.)¹¹ Baker was not held in contempt at that time and the hearing was continued.

Subsequently, the prosecutors never executed the search warrant for Baker, (3 J.A. 504) nor did they resume the contempt proceedings.

¹¹ Interestingly, Judge Cooper also commented on the fact that Gabbert's practice included representation of numerous grand jury witnesses. As she stated, "that's an unusual specialty, but there you are." (3 J.A. 642.)

SUMMARY OF ARGUMENT

This Court has long recognized that while prosecutors may strike hard blows, those blows must always be fair ones. The conduct of the prosecutors in this instance ran afoul of that standard. They violated the Respondent lawyer's rights under the Fourteenth Amendment by timing the execution of a search warrant to preclude him from advising his client who was testifying before a grand jury.

The defense attorney here was hired to assure, among other things, that his client would not be compelled to be a witness against herself in an investigation where the lawyer and his client had been told that the client was a target. The attorney had been alerted to several incidents where the prosecutors and their agents had made unethical, if not illegal, attempts to get his client to disclose incriminating information in the days and weeks before her grand jury appearance. The prosecutors were cognizant of the client's right to leave the grand jury room after each question was asked and seek the advice of her attorney, the Respondent, before she was obligated to respond to the question. They were also keenly aware that if the Respondent were physically present to counsel the client that he would, whenever appropriate, resist the disclosure of incriminating evidence by invoking privileges. The prosecutors were further aware that if they took steps to make the Respondent unavailable to give advice to his client and compelled her testimony in his absence, that they increased the likelihood that the client, uncounselled and intimidated, would disclose incriminating information and increase their chances of obtaining evidence necessary to indict her. Any such disclosure by the client would have been irreversible.

As the Ninth Circuit found, the prosecutors timed the execution of a search warrant of the Respondent's person

and effects to render him physically unavailable to give such counsel and advice to his client. They so timed the execution of the warrant even though there were several other alternatives available to them which could have allowed for its effective execution while also affording the Respondent the right to provide counsel to his client.

In engaging in such conduct, the Petitioners violated the Respondent's clearly established Fourteenth Amendment liberty right to counsel his client, in the scope and course of the practice of his profession, free from unreasonable governmental interference.

ARGUMENT

I. AN ATTORNEY HAS A CONSTITUTIONAL RIGHT TO PRACTICE HIS PROFESSION FREE FROM GOVERNMENTAL INTERFERENCE

The foregoing facts reveal a case of egregious government misconduct. Furthermore, that conduct occurred at the precise moment in time when a client's need for the assistance of her attorney, specifically the need for advice on whether or not to answer certain questions and turn over documents, was the greatest - when she faced the extraordinary risk of committing an irreversible act which might very well have made the difference in whether she would or would not have been prosecuted. Indeed, at the precise moment when the client was the most vulnerable, the prosecutors physically separated her from her lawyer so that he could not provide the advice that he was hired to provide.

A. IT IS THE DUTY AND OBLIGATION OF AN ATTORNEY TO ADVISE AND COUNSEL A CLIENT WHO HAS BEEN BOTH TARGETED BY AND SUBPOENAED TO TESTIFY BEFORE, AND PRODUCE DOCUMENTS TO, A GRAND JURY

1. Because She Could Have Potentially Incriminated Herself or Otherwise Waived Her Constitutional and Statutory Privileges, Baker Hired a Lawyer to Represent Her in the Grand Jury and She Had a Right to Expect That the Government Would Not Interfere with Her Legal Representation

Fundamentally, the role of all lawyers is to safeguard the interests of those who cannot protect themselves. Describing a lawyer's obligations to his client in 1856, this Court stated: "There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, . . . [or] few more anxiously guarded by the law." *Stockton v. Ford*, 52 U.S. (11 How.) 232, 247 (1850). One hundred years later, Justice Frankfurter wrote:

[A]ll the interests of man that are comprised under the constitutional guarantees given to 'life, liberty, and property' are in the professional keeping of lawyers. It is fair characterization of the lawyer's responsibility in our society that he stands 'as a shield,' . . . in defense of right and to ward off wrong.

Schware v. Board of Bar Exam'rs of New Mexico, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring); see also *Dameron v. Herzog*, 67 F.3d 211, 214 (CA9 1995) (noting the "historical importance of the public trust in the attorney-client relationship").

Because of the longstanding universal recognition that full and meaningful communication between attorneys and clients is essential to the proper functioning of

our justice system, the attorney-client relationship is protected by both common law privileges and the First Amendment. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (explaining that because the "broad [] public interest[] in the observance of law and the administration of justice," is served by attorney-client relationship, communications between an attorney and his client are deemed privileged); *Trammel v. United States*, 445 U.S. 40, 51 (1980) (describing doctor-patient and lawyer-client testimonial privileges as "rooted in the imperative need for trust and confidence. . . . The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."); see also *Swidler v. United States*, ___ U.S. ___, 118 S. Ct. 2081, 2084 (1998) (observing significance of attorney-client relationship);¹² *Poe v. Ullman*, 367 U.S. 497, 513 (1961) (Douglas J., dissenting) (recognizing an "obvious" First Amendment right of doctor to advise patients); see generally *Rust v. Sullivan*, 500 U.S. 173, 214 (1991) (Blackmun, J.,

¹² A necessary corollary to a client's right to engage in a confidential, privileged conversation with her attorney, or her right to have counsel present in a particular circumstance, is the attorney's right and obligation to assert those rights on behalf of the client. See, e.g., *Fisher v. United States*, 425 U.S. 391, 402 (1976) (attorney has standing to raise attorney-client privilege on behalf of his client) and *Russo v. Byrne*, 409 U.S. 1219, 1221 (1972) (attorney has standing to assert Sixth Amendment rights of client). As lower courts have observed, a lawyer's ability to provide the necessary legal services to his client is "inextricably bound up" with the client's constitutional entitlement to those services. See *Wounded Knee Legal Defense/Offense Comm. v. F.B.I.*, 507 F.2d 1281, 1284 (CA8 1974), citing *Nyberg v. City of Virginia*, 495 F.2d 1342, 1344 (CA8), cert. denied, 419 U.S. 891 (1974). Thus, "[t]he vindication of one [right] is consequently dependent upon the vindication of the other." *Keker v. Procunier*, 398 F. Supp. 756, 765 (E.D. Cal. 1975).

dissenting) (noting a physician's "compelling" interest in conveying information to patients).

In addition to the threshold protections and privileges accorded to the attorney-client relationship generally, even greater rights have been accorded to both the attorney and client in the criminal arena because a defendant's liberty (and sometimes life) are at stake. Thus, for example, an accused has a Sixth Amendment right to counsel at all critical stages of proceedings. *Kirby v. Illinois*, 406 U.S. 682, 690-91 (1972); see also *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (explaining that the right to counsel embodied in the Sixth Amendment is predicated on the notion that assistance of counsel in criminal cases is essential to our adversary system of criminal justice.) While an explicit textual basis for the right to counsel in a criminal case is found in the Sixth Amendment, that right is also incorporated in the concept of due process of law. *Powell v. Alabama*, 287 U.S. 45, 67 (1932); *Gideon*, 372 U.S. at 342-43. As this Court affirmed in *Alvord v. Wainwright*, 469 U.S. 956, 961 (1984), the Sixth and Fourteenth Amendments embody "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty." 469 U.S. at 961, quoting *Johnson v. Zerbst*, 304 U.S. 458 (1938); see also *United States v. Flanagan*, 679 F.2d 1072, 1075 (CA3 1982), *rev'd on other grounds*, 465 U.S. 259 (1984) (noting that defendant's decision to select attorney is protected by Sixth Amendment and Fifth Amendment due process clause).

Perhaps the single most important function a lawyer serves for a client facing potential criminal prosecution is to prevent the client from becoming a witness against himself, i.e., unknowingly waiving his Fifth Amendment right against self-incrimination. See *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964). The potential costs to an accused who is unaware of this

right, or unwittingly waives it, are myriad: the ignominy of being charged or arrested, the expense and psychological trauma of trial, conviction, sentencing, incarceration and, in some instances, loss of life. However, an attorney's ability to fulfill this significant function is necessarily dependent upon his ability to communicate and consult with his client. See, e.g., *United States v. Tucker*, 716 F.2d 576, 581 (CA9 1983) (noting that adequate consultation between attorney and client is an essential element of competent representation of a criminal defendant); *Coles v. Peyton*, 389 F.2d 224, 225-26 (CA4), *cert. denied*, 393 U.S. 849 (1968). If a lawyer is prevented from speaking with and advising his client as to her constitutional rights, the client may as well not have the rights at all. They only protect her if she has the knowledge and guidance required to effectively exercise them. This principle is particularly applicable where circumstances such as fear and intimidation, such as existed here, attend the questioning of the client.

2. The Guidance of a Lawyer at The Grand Jury Stage Is Critical Because the Client's Liberty Is at Stake

We have set out in some detail the perils faced by Gabbert's client on the morning of March 21 in order to allow a full appreciation of the rights he was prepared to defend on that occasion. We stress, however, that this is not a lawsuit filed on the client's behalf; we do not pursue relief on any claims she may have had. We simply believe that it is essential to fully appreciate her predicament in order to understand what the Petitioners prevented Gabbert from doing.

Nor is it our contention that the client had a constitutional right to have counsel present with her physically when she testified before the grand jury. In fact, we recognize that the federal courts and many states do not

allow counsel in the room.¹³ But that fact is of no moment to our constitutional claim. For, what is significant is that the Los Angeles District Attorney's office had at the time (and still has) a practice, followed by the Petitioners here, of allowing the witness the right to leave the room and receive legal advice before answering a question. (See Appendix C.) This is the same practice that exists in the federal system, one which guards against the inherent dangers and potential prejudice faced by all witnesses. *In re Grand Jury Subpoena*, 97 F.3d 1090, 1093 (CA8 1996); *United States v. Plache*, 913 F.2d 1375, 1380 (CA9 1990); *United States v. Schwimmer*, 882 F.2d 22, 27 (CA2 1989); *In re Grand Jury Subpoena*, 859 F.2d 1021, 1024 (CA1 1988); *In re Special Grand Jury*, 676 F.2d 1005, 1010 (CA4 1982); *United States v. George*, 444 F.2d 310, 315 (CA6 1971).¹⁴ And while this Court has never squarely addressed the issue of whether a grand jury target should have a right to counsel in order to prevent potential violations of a witness' Fifth Amendment rights, this Court has implicitly acknowledged the right of a witness to consult with counsel during the course of her testimony. *United States v. Mandujano*, 425 U.S. 564, 581 (1976).

¹³ In contrast to federal practice, twenty states permit counsel to be present in the grand jury room. Some states, such as Arizona, Indiana, Louisiana and New Mexico, only permit counsel in the grand jury room if the witness is a target; others, such as Kansas, permit the attorney to ask questions; and still others, such as New York, even provide court appointed counsel to the witness. (See Appendix A.)

¹⁴ One reason federal courts have not thought it necessary to permit counsel in the room is the assumption that a witness will have unfettered access to counsel outside the room and thereby sufficient protection of the witness' constitutional rights. See, e.g., *United States v. Levinson*, 405 F.2d 971, 980 (CA6 1968).

The characterization of the client's right to her lawyer's counsel outside the grand jury as constitutional or otherwise is of no importance here. What is important is that she was accorded that privilege. The state cannot accord a right and then arbitrarily take it away. See *Cafeteria and Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 894 (1967) (observing that "[o]ne may not have constitutional right to go to Baghdad, but the government may not prohibit one from going there unless by means consonant with due process of law.")

The perils faced by a grand jury witness render the guidance of a lawyer crucial. At minimum, legal assistance is necessary because a layman is not aware of "the precise scope, the nuances, and boundaries" of the testimonial privileges at issue, *Maness v. Meyers*, 419 U.S. 449, 466 (1975), or how easily a privilege may be unwittingly waived. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 236 (1973); see also *Coleman v. Alabama*, 399 U.S. 25, 25 (1970) (Burger, J., dissenting) (arguing that grand jury a more "critical" stage than preliminary hearing); *United States v. Levinson*, 405 F.2d 971, 986 (CA6 1968) (counsel should be present at grand jury to protect the witness "from abuse of power of a prosecutor or from a violation of constitutional rights."); *Hawkins v. Superior Court*, 22 Cal. 3d 584, 589, 150 Cal. Rptr. 435, 586 P.2d 916 (1978) (observing the irony that grand jury is captive of prosecutor, yet greater rights under California law attach at preliminary hearing). Moreover, although not yet formally charged, the grand jury witness is nonetheless "faced with the prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural criminal law." *In re Special Grand Jury*, 676 F.2d 1005, 1010 (CA4 1982), quoting *Kirby v. Illinois*, 406 U.S. at 689.

Indeed, in practical terms there is no meaningful distinction between interrogation of a suspect in custody at a station house and the questioning of a grand jury witness. The grand jury witness has as much a right to

invoke privileges and, in reality, is as much in "custody" as the arrestee because he or she is compelled by subpoena to appear, is obligated by law to answer questions under threat of contempt, and may not leave the grand jury proceedings unless excused. In that sense, the grand jury witness is no more free to leave than the suspect who is "held" by law enforcement and entitled to *Miranda* warnings before questioning. Certainly, as California and federal practice assumes, it makes equal sense to allow the grand jury witness the same right and ability to freely consult with her attorney. As the Fourth Circuit concluded, in language applicable to this case:

[E]ven though [a] witness does not have the right to have counsel appointed for him, he has a substantial interest in continuing to receive the assistance of counsel he has already retained for purposes of the grand jury investigation. The interests in maintaining a proper attorney-client relationship and protecting the confidences of that relationship are similar to the sixth amendment right to effective assistance of counsel and fundamental to our adversarial system of justice.

In re Special Grand Jury, 676 F.2d 1005, 1010 (CA4 1982). Here, Baker retained Gabbert to steer her through the unfamiliar and precarious territory of a grand jury proceeding. As she testified, Gabbert was the "rock" to which she was anchored. She relied on Gabbert's knowledge, judgment and training to protect and preserve her fundamental rights. However, as detailed below, the government's deliberate, unnecessary actions prevented Gabbert from providing her with the advice and counsel she hired him to provide.

B. GABBERT HAD A FUNDAMENTAL RIGHT TO ADVISE AND COUNSEL HIS CLIENT

This Court has repeatedly emphasized that the "touchstone of due process is protection of the individual against arbitrary action of the government." *County of Sacramento v. Lewis*, ___ U.S. ___, 118 S. Ct. 1708, 1716 (1998), quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). For over a century, this Court has also held that the substantive component of the Due Process Clause protects an individual's liberty right to practice his profession free from arbitrary governmental interference. See *Schwartz v. Board of Bar Exam'rs of N.M.*, 353 U.S. 232, 238-39 (1957) ("A state cannot exclude a person from the practice of law or from any other occupation . . . for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("Without doubt, [Fourteenth Amendment concept of 'liberty'] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life."); *Truax v. Raich*, 239 U.S. 33, 41 (1915) ("It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."); *Dent v. State of West Virginia*, 129 U.S. 114, 121 (1889) ("It is undoubtedly the right of every citizen of the United States to follow any lawful calling."); see also *Leis v. Flynt*, 439 U.S. 438, 445 (1979) (Stevens, J., dissenting) ("A lawyer's interest in pursuing his calling is protected by the Due Process Clause of Fourteenth Amendment.")¹⁵

¹⁵ Substantially all of the cases relied on by petitioners for the proposition that, in order to state an actionable due process claim, Gabbert must be entirely excluded from his profession,

While the constitutional right at issue is framed by the due process right of a professional to practice his occupation, its violation in this case, as the Ninth Circuit concluded, was effected by the government's interference with a lawyer's right to communicate with, and counsel, his client – a right guaranteed by the First Amendment. See, e.g., *Poe v. Ullman*, 367 U.S. 497, 513-14 (1961) (Douglas, J., dissenting) ("the counselor, whether priest, parent or teacher, no matter how small his audience – these too are beneficiaries of freedom of expression)."

Unlike virtually all of the cases relied on by the Petitioners, this case does not turn on the economic liberty interests that are commonly impinged when one is prevented from engaging in the occupation of one's choice. This case is different. Gabbert's claim is not an economic one based on a loss of income. Rather, his claim is that on the morning of March 21 he was prevented from carrying out an essential role in our accusatorial system of criminal justice. He was not simply there to protect his client as a matter of prosecutorial grace. He was there to protect the fundamental, constitutional rights of his client. In order to accomplish that goal, it was imperative that he be able both to give information to, and to receive information from, Baker. He could not protect her liberty interests in any meaningful way without this reciprocal communication. As Gabbert testified at his deposition:

involve procedural due process claims. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972); see also *Cleveland Bd. of Educ. v. Lauderman*, 470 U.S. 532 (1985); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Morley's Auto Body, Inc. v. Hunter*, 70 F.3d 1209 (CA11 1996); *Daly v. Sprague*, 675 F.2d 716 (CA5 1982); see generally *Phillips v. Washington Legal Found.*, ___ U.S. ___, 118 S. Ct. 1925 (1998) (due process clause not at issue). However, Gabbert has never claimed a procedural due process violation in this lawsuit.

In my experience in practicing criminal defense for a number of years – and I have advised numerous clients before grand juries – I find that a grand jury hearing is inherently stressful for the client. The client is always nervous.

In this particular situation, the client was a target of a perjury investigation and had been asked to bring documents, the production of which tended to incriminate her. Immunity had been refused prior to that date. And now the lawyer who was supposed to be her champion and advocate to protect her before that tribunal was being searched and literally carried away.

(Appendix G, p. 7.) It is that impairment of Gabbert's fundamental right to represent and protect the fundamental rights of his client that defines the Fourteenth Amendment violation in this case.

The opinion in *Keker v. Procunier*, 398 F. Supp. 756 (E.D. Cal. 1975), is instructive. There, the court held that where state officials intrude into "the privacy and freedom from intrusion essential to the attorney-client relationship," an attorney's substantive due process right to practice his profession has been violated. 398 F. Supp. at 761. At issue in *Keker* were the conditions of attorney visiting rooms at Folsom State Prison. The court concluded that because communications between the attorneys and clients were, among other things, circumscribed by partitions and subject to continual surveillance, the attorney's ability to practice his profession was impeded. *Id.* at 761. The court's rationale was grounded on cases such as *Roe v. Wade*, 410 U.S. 113 (1973) and *Nyberg v. City of Virginia*, 495 F.2d 1342, *cert. denied*, 419 U.S. 891 (1974), which acknowledge a physician's right to practice his profession and his patient's correlative right to consult with him regarding his medical treatment; and on Sixth Amendment right to counsel cases, such as *Wounded Knee Legal Defense/Offense Com. v. F.B.I.*, 507 F.2d 1281 (CA8

1974), which hold that a client's Sixth Amendment right is necessarily dependent upon the attorney's right to practice his profession without government intrusion.

The analytical underpinning of these cases is the concept that where the fundamental role of the professional is to counsel a client, that is, to provide information so that another person may make an informed choice regarding conduct which may irrevocably alter his future, the professional cannot be silenced by the government. With respect to the role of a lawyer, the *Keker* Court stated:

Legal issues and questions pervade virtually all aspects of our increasingly complex society. The modern attorney must at times be lawyer, counselor and advocate. Just as the physician is entrusted by society with the enhancement and preservation of life and health, the attorney is charged with advancement and protection of property, of liberty, and occasionally, of life.

398 F. Supp. at 760, citing *Nyberg v. Virginia* and *Young Women's Christian Ass'n of Princeton v. Kugler*, 342 F. Supp. 1048 (D.N.J. 1972). The court went on to conclude: "The [the lawyer's] right to practice a profession necessarily includes the right to practice according to the highest standards of that profession. At the foundation of the legal practice is the right to maintain the privacy and freedom from intrusion essential to the attorney-client relationship." 398 F. Supp. at 761 (citation omitted).

Keker also relied on more venerable cases of this Court, such as *Meyer v. Nebraska*, 262 U.S. 390 (1923), which involved a teacher's right to teach and a parent's right to educate their children as they see fit. In *Meyer* a state statute banned the teaching of German in Nebraska schools. Although the statute did not prohibit the plaintiff teacher from teaching all courses – the Court noted that teaching German was just a part of Meyer's occupation – the Court nonetheless held that it violated Meyer's

substantive due process right to practice his profession. As the Court concluded, the interference with the teacher's "right thus to teach and the right of the parents to engage him so to instruct their children" was "plain enough". 262 U.S. at 400, 402; see also *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (suspension of child from school implicates due process liberty interests because of corresponding deprivation of education).

The common thread uniting the cases cited above and the case before this Court is that the rights of the professional are so intertwined with that of the recipient of the professional services, that the interference with the professional's constitutional right and ability to do his job necessarily results in an equivalent interference with the client's constitutional right and ability to obtain those services. Thus, where as here, when the client depends on professional judgment to make critical life choices, the interference with the ability to practice one's profession is eviscerated at the moment the government prevents the professional from offering his judgment.¹⁶

What *Meyer*, *Keker*, *Wounded Knee* and other cases also teach is that where fundamental rights are at issue, the length, breadth and duration of the violation are irrelevant. In these situations, even a minimal, temporary violation is actionable as long as the Constitution has been infringed. As Judge Posner eloquently wrote:

The law does not excuse crimes or torts merely because the harm inflicted is small. You are not privileged to kill a person because he has only one minute to live, or to steal a penny from a Rockefeller. The size of the loss is relevant sometimes to jurisdiction, often to punishment,

¹⁶ Although lawyers and physicians are obvious illustrations of this unique relationship, another equally sensitive and important relationship exists between a priest and penitent.

and always to damages, but rarely if ever to the existence of a legal wrong.

Hessel v. O'Hearn, 977 F.2d 299, 303 (CA7 1992); see also *Lewis v. Woods*, 848 F.2d 649, 651 (CA5 1988) (holding that constitutional violation is never *de minimis*). There are multiple other illustrations of this principle. For example:

- *The Right to Freedom of Speech*

The government does not have to entirely ban speech in order to violate First Amendment rights, a temporary disruption will suffice. See, e.g., *Gibson v. United States*, 781 F.2d 1334 (CA9 1986) (flying police helicopter over plaintiff's apartment to disrupt meeting violates First Amendment).

- *The Right to Be Free from Unreasonable Searches and Seizures*

A limited search of a pocket may be unreasonable. *Terry v. Ohio*, 392 U.S. 29-30 (1968) (even a minimal search of outer clothing constitutes intrusion upon "cherished personal security"). Furthermore, the seizing of a single item beyond the scope of a warrant violates the Fourth Amendment. *Hessell v. O'Hearn*, 977 F.2d 299, 303-304 (CA7 1992) (taking a can of Coca Cola from suspect's refrigerator during search violates Fourth Amendment).

- *The Right to Travel*

In order to violate the right to travel, a complete ban on travel is unnecessary; it may be violated by durational residency requirement for governmental benefits. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (residency requirement for welfare benefit held invalid as restriction on fundamental right to travel).

- *The Right to Vote*

Where the right to vote is not prohibited, but only diluted, the right of suffrage has nonetheless been denied. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (right of suffrage denied by dilution of weight of vote just as effectively as by wholly prohibiting the right to vote);

McCarthy v. Garrahy, 460 F. Supp. 1042, 1049 (D.R.I. 1978) (constitutional right to vote infringed even where burden on access to the ballot is limited).

- *The Right to Own Property*

The constitutional protection of the rights of property owners does not depend on the value or the size of property. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-37 (1982) (constitutional protection for the rights of private property owners cannot be made dependent on size of area occupied); *Parratt v. Taylor*, 451 U.S. 527, 537 (1981), *rev'd on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986) (hobby kit valued at \$23.50 is constitutionally protected property).

Here, the constitutional harm was complete, and the resulting damage was done, when the prosecutors precluded Gabbert from advising his client.

In addition to violating Gabbert's due process rights, the prosecutors' conduct also implicated his First Amendment right to freedom of speech. The Constitution protects speech by professionals in a variety of circumstances and, in some cases, this Court accords speech by attorneys on matters of legal representation the "strongest protection our Constitution has to offer." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995). Such protection has covered not only political speech, see *Gentile v. State Bar*, 501 U.S. 1030 (1991); *In re Primus*, 436 U.S. 412 (1978), but legal advertising, as well. See *Went For It, Inc.*, 515 U.S. at 622-23; *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988); *Bates v. State Bar*, 433 U.S. 350 (1977) (noting that truthful advertising serves significant societal interests and, even if entirely commercial, often carries critical information).

Unquestionably, the right of an attorney to advise clients to the best of one's ability, an ethical duty the attorney has sworn to uphold, falls squarely within the First Amendment. Cf. *Poe v. Ullman*, 367 U.S. 497, 513 (1961) (Douglas, J., dissenting) (finding that a doctor has

an "obvious" First Amendment right to advise patients). As discussed above, the bedrock of the attorney-client relationship is free and open communication. *See also Rust v. Sullivan*, 500 U.S. 173, 199-200 (1991) (Blackmun, J., dissenting) (noting a physician's "compelling" interest in conveying information to women seeking family planning advice). Moreover this sharing of information has repercussions outside the individual relationship; clients who possess enough information to make intelligent choices facilitate the efficient functioning of the judicial system. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). In this case, the prosecutors engaged in purposeful conduct which unlawfully restricted Gabbert from giving counsel to his client.

The intentional sequestration of Gabbert was especially egregious because it imposed a prior restraint on the speaker. This Court has consistently held that prior restraints are the most serious invasions of the First Amendment. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). Typically, prior restraint cases deal with injunctions or permits which prohibit or curtail speech. *See Alexander v. United States*, 509 U.S. 544, 550 (1993); *see generally* Allan Ides & Christopher N. May, *Constitutional Law - Individual Rights* (1998). In these instances, the speaker can choose to speak and violate his restraint. Here, Gabbert had no such choice. The prior restraint was absolute; the prosecutors' conduct was as effective as if they had sealed his mouth with tape.

The speech restraint in this case was also content-based. Gabbert had alerted the prosecutors days before his client's grand jury appearance of his intent to advise her to resist disclosing incriminating information. It was precisely for that reason that they chose to make him unavailable to give her that advice. This manner of restricting speech has been held by this Court to be particularly offensive. Singling out and penalizing speech

due to the speaker's viewpoint is a patent violation of the First and Fourteenth Amendments. *See Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) ("[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, [or] its ideas.").

The prosecutors prevented Gabbert from speaking with his client because of who he is and the message he would have conveyed. Because his communication with Baker would have been detrimental to their success in obtaining incriminatory evidence from Baker, the prosecutors timed the execution of the warrant precisely so as to restrain his speech. Even absent due process limitations on such unreasonable conduct by governmental actors, the First Amendment would forbid it.

C. THE PROSECUTORS INTERFERED WITH GABBERT'S RELATIONSHIP WITH HIS CLIENT

1. The Execution of The Search Warrant Was Timed to Invade The Attorney-Client Relationship

Gabbert's client found herself on the Monday morning of her grand jury appearance in a much more precarious situation than the average grand jury witness. In the first place, she had already been targeted for prosecution by the grand jury making her more vulnerable than an ordinary witness. Moreover, she was called into the grand jury on the heels of a discussion about her possible arrest, which led her to understand it to be a potentially imminent event. In fact, it was her belief, as her lawyer was being led away to be searched, that Conn might cause her to be arrested in the hallway of the courthouse. (2 J.A. 476.) While she was depending on the lawyer she had hired to help her navigate these hostile waters and guide her to safety, the prosecutors made sure that she

would find no safe harbor there. As the Ninth Circuit found: "The only apparent reason to have both [the search and grand jury appearance] occur at the same time was the prosecutors' desire to prevent Gabbert from communicating with his client." (App. A to Pet. for Writ of Cert., p. 14.)

A review of the course of conduct by the District Attorneys in this case shows that it was deliberately designed to achieve a specific goal – to frighten, intimidate and finally separate a young woman from her lawyer and to then take advantage of that isolation, to elicit incriminating information from her without benefit of counsel. It began with Zoeller and Miller's (agents of the prosecutors) appearance at Baker's home in late February. It continued with the prosecutors' search of her home on Friday night, March 18, in clear violation of the California Rules of Professional Conduct. It continued further on the morning of March 21 when Conn deceived her and Gabbert into believing that she was going to be granted immunity. That deception was followed by Conn's thinly veiled intimidation tactic of asking Gabbert in his client's presence if she would surrender and save them the trouble of arresting her. The prosecutors' maneuvering finally culminated in the execution of the search warrant and the client's simultaneous grand jury appearance and questioning. With refreshing candor, Petitioners' attorney conceded at oral argument before the Ninth Circuit that the service of the search warrant was timed "to take advantage . . . of the nervousness of the client [and] the distraction this would cause to the attorney." (Appendix B, pp. 27-28.)

The impact of Petitioners' strategy on Gabbert's client was severe. As she related in her deposition:

And I came out [of the grand jury room] and proceeded to wait for what I perceived as a considerable amount of time, although it probably wasn't, in fact. I don't know. I was super,

super, super nervous, real upset because I wasn't able to see Paul. I didn't know, in fact, whether I should have asserted the Fifth Amendment on the first question, and I was waiting, again. And I don't know if you've ever had to testify before the grand jury, but making 50 people, or however many people, wait for you, constantly going out of the room made me even more upset. I was real upset waiting, and it seemed like an eternity. I recall the bailiff was there with me. And at that point – at some point, I was directed to go back into the room, that they could not wait any longer, that I had to go back into the room. And I said I needed to talk to my attorney. And I don't know if they said, "Too bad," but they said, "I'm sorry, ma'am, you have to go in." I don't know who said that to me.

(2 J.A. 469-470.) Just as the client was deprived of the assistance she had retained her attorney to provide, so was the Respondent prevented by the Petitioners' conduct from rendering the expert counsel he had been hired to provide. As Gabbert expressed:

This impaired the relationship of special trust and confidence that inures in the attorney-client relationship because she was looking at me and I'm being searched. How am I going to protect her? How can she really rely on my advice if this is being done to me? She is a layperson.

(Appendix G, p. 7.)

Such deliberate conduct by the prosecutors in preventing an attorney from assisting a client in exercising her fundamental rights violates the Due Process Clause of the Fourteenth Amendment because the conduct "shocks the conscience" of a civilized society. In *Moran v. Burbine*, 475 U.S. 412 (1986), this Court found that the defendant's *Miranda* rights were not violated when he knowingly and

voluntarily waived those rights even though the police deceived him about his lawyer's availability and his lawyer about his questioning. In finding a waiver of the defendant's rights, the Court's *Miranda* analysis focused on his state of mind and not on the police misconduct. *Id.* at 421-422. In fact, the defendant never asked to speak to an attorney; he "spontaneously initiated" his first and most damaging confession. *Id.* With respect to the defendant's due process claim, where the Court did focus not on the defendant's or his lawyer's state of mind, but on the police misconduct, this Court found that while the conduct was troubling, it fell short of the kind of misbehavior to so shock "the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the states."¹⁷ *Id.* at 433-34. The Court did find, however, that: "We do not question that on facts more egregious than those presented here police deception might rise to a level of a due process violation." *Id.* at 432.

We respectfully urge that the misbehavior in this case rises beyond that level and warrants the conclusion that a due process violation occurred. We note that Justice Stevens, in his vigorous dissent in *Moran*, catalogued a string of state court cases where remedial action was taken by different courts on various factual showings involving defendants and their lawyers who were the victims of misleading statements by the police. The facts in each of those cases, as the facts in *Moran*, involved police deception. *Moran v. Burbine*, 475 U.S. 412, 441 (1986). In *Moran*, for instance, the lawyer was simply given false information about the lack of questioning and not told that her client would be questioned about a particular murder charge. *Id.* at 416-17. None of these

¹⁷ The Court did acknowledge that its decision was at odds with a number of state courts' decisions and the policy recommendations embodied in the American Bar Association Standards of Criminal Justice.

cases rises, however, to the level of affirmative activity (which we have here) by a prosecutor who causes the physical removal of the client's lawyer so as to make him unavailable during the client's questioning. And none of those cases appears to involve the intimidating circumstances which surrounded the client here or the calculated maneuverings of the petitioners.

In his dissent in *Moran*, Justice Stevens looked back on those cases where this Court "has given a more thoughtful consideration to the requirements of due process" and found that violations did occur. *Id.* at 466. These violations range through a variety of examples of prosecutorial misconduct, but all are based on the unquestioned principle "that due process requires fairness, integrity and honor in the operation of the criminal justice system, and its treatment of the citizen's cardinal constitutional protections." *Id.* Justice Stevens concluded his dissent with words that clearly describe the position the Respondent strenuously advances here:

This case turns on a proper appraisal of the lawyer in our society. If a lawyer is seen as a nettlesome obstacle to the pursuit of wrongdoers - as in an inquisitorial society - then the Court's decision today makes a good deal of sense. If a lawyer is seen as an aid to the understanding and protection of constitutional rights - as in our accusatorial society - then today's decision makes no sense at all.

Id. at 468.

Petitioners maintain that even if Gabbert's ability to advise Baker was impaired, the responsibility lies with Gabbert and Baker. That claim is disingenuous and strains the bounds of credulity. The Petitioners' course of conduct left him no other choice. Indeed, the Petitioners' conduct forced Gabbert into choosing whether to attempt to protect the attorney-client privileged files of Baker and several other clients, and hope the prosecutors would

honor his request that the questioning of Baker be delayed, or remain available to Baker, and allow the special master to rummage unfettered through his client files, thereby potentially waiving privileges held by both Baker and other clients. A prosecutor should not be permitted to create such an untenable choice. *See generally DeMassa v. Nunez*, 770 F.2d 1505 (CA9 1985). In any event, the subject of a search warrant does not have the prerogative of terminating or delaying its execution. *See Cal. Penal Code* § 166(5) (declaring it a misdemeanor to willfully offer resistance to the lawful process of a court); *Evans v. Bakersfield*, 22 Cal.App.4th 321, 27 Cal.Rptr.2d 406 (1994) (no right to physically resist even an unlawful detention).

Further, to contend that it was Baker's responsibility to cause the questioning to stop so that she could find her lawyer is similarly without merit. At the time of her testimony, Traci Baker was an unsophisticated, twenty-four year old waitress, who found herself in the unenviable position of being a target of a grand jury perjury investigation in connection with one of the most notorious murder trials of this century. To suggest that a terrified young woman, who has just learned that she might be indicted and who has just had her lawyer apprehended by law enforcement officials, is supposed to unilaterally halt the machinery of the grand jury – including twenty three grand jurors and two veteran prosecutors – belies common sense and reason. Indeed, Baker's reluctance to anger or irritate the prosecutors was well justified in this case. When she refused to provide the answers they wanted before the grand jury, the foreperson, without any apparent authority, actually "held" her in contempt. (3 J.A. 616.) It cannot be acceptable in this context, or indeed in any other, for prosecutors to cause the search of a witness' lawyer and then blame the witness for being unable to consult with that lawyer.

2. The Facial Validity of the Warrant Does Not Preclude A Constitutional Violation

Petitioners maintain that because the search of Gabbert was pursuant to a valid warrant, and the warrant was executed by a special master as required by California state law, a Fourteenth Amendment violation could not have occurred. To begin with, Gabbert disputes that the warrant was validly obtained or executed by the special master.¹⁸ Furthermore, contrary to the Petitioners' contentions, the facial validity of the warrant itself does not ameliorate the unreasonableness of the execution of the search warrant for the well-established reason that a lawful warrant may be executed in an unlawful manner.

There are numerous and varied restrictions on the execution of a warrant. For example, a warrant may not be executed in an impermissibly broad manner. *See United States v. Foster*, 100 F.3d 846, 849 (CA10 1996); *United States v. Disla*, 805 F.2d 1340, 1346 (CA9 1986); *see also United States v. Grandstaff*, 813 F.2d 1353, 1358 (CA9), *cert. denied*, 484 U.S. 837 (1987); *United States v. Gomez-Soto*, 723 F.2d 649, 654 (CA9), *cert. denied*, 466 U.S. 977 (1984); 2 Wayne R. LaFare, *Search & Seizure: A Treatise on the Fourth Amendment* § 4.10(d), at 671-72, 678-81 (3d ed. 1996).

¹⁸ Gabbert alleged in the complaint that the warrant contained material misstatements in violation of *Franks v. Delaware*, 438 U.S. 154 (1978). (1 J.A. 22, 128-130.) Moreover, the special master violated California law when searching Gabbert's briefcase. (1 J.A. 26; *see also* Plaintiffs Mot. for Leave to File First Am. Compl., filed January 9, 1995; App. A to Pet. for Writ of Cert., p. 25.) As the Ninth Circuit commented, "[the special master] violated several provisions of the California statute regulating the execution of a search of an attorney." (citation omitted). Additionally, the Court stated, "his decision that Gabbert's files contained no privileged material . . . is contrary to even the most basic understanding of the attorney-client privilege." (App. A to Pet. for Writ of Cert., p. 19 n.6.)

Another limitation is the requirement that officers must "knock and announce" before entering a suspect's home. See *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995). Similarly, repetitive searches are not permissible without additional authority. See *LaFave*, § 4.10(a); see also *United States v. Mittleman*, 999 F.2d 440, 442-43 (CA9 1993). At bottom, a government official may never enforce a facially valid statute, policy or warrant in an "egregious manner." See, e.g., *Pierce v. Multnomah County*, 76 F.3d 1032, 1037 (CA9 1996); *Grossman v. Portland*, 33 F.3d 1200, 1209-10 (CA9 1994); *Chew v. Gates*, 27 F.3d 1432, 1449-50 (CA9), cert. denied, ___ U.S. ___, 115 S. Ct. 1097 (1994); see also *Malley v. Briggs*, 475 U.S. 335, 346 (1986) (noting that officers must exercise "reasonable professional judgment" in applying for a warrant).

What is at issue before this Court is not an incidental or unavoidable delay caused by the government. Whether a warrant should have been obtained for Gabbert in the first instance, or whether that warrant itself was lawful, is similarly not at issue. Rather, what is at issue is a deliberate course of conduct by Conn and Najera which had the trappings of lawfulness, but which was actually designed to interfere with an attorney-client relationship at the precise instant that client needed her attorney most. It is of no moment that the vehicle they chose as their mode of interference was itself arguably lawful, when their overall plan was implemented in such a blatantly unlawful manner.

D. PETITIONERS ACTED, AT THE VERY LEAST, IN A MANNER WHICH WAS DELIBERATELY INDIFFERENT TO GABBERT'S RIGHT TO COUNSEL HIS CLIENT

Traditionally, it has been held that in order to state a violation of substantive due process, it must be demonstrated that the government official's conduct "shocked

the conscience." See *Rochin v. California*, 342 U.S. 165, 172-73 (1952). This Court has noted that this standard, in a vacuum, creates a risk of subjective imprecision in application. See, e.g., *County of Sacramento v. Lewis*, ___ U.S. ___, 118 S. Ct. 1708, 1722 (1998) (Kennedy, J., concurring). In *Lewis*, the Court clarified the test for determining what is shocking to the conscience, concluding that it will vary depending upon the context in which the alleged violation occurred. 118 S. Ct. at 1720. Thus, the Court explained, in the context of a high speed police pursuit, intent by a police officer to cause harm must be demonstrated in order for the chase to be constitutionally actionable because a rapidly developing situation involving unforeseen circumstances required instant judgment. *Id.* The Court also reaffirmed that where, as here, the circumstances allow for reflection and deliberation, deliberate indifference alone may be deemed "truly shocking." *Id.*

Deliberate indifference, in substantive due process cases, has been defined by the lower courts in a variety of ways. For instance, the Ninth Circuit has described deliberate indifference as conduct that is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Wedges/Ledges of Ca., Inc. v. City of Phoenix*, 24 F.3d 56, 65 (CA9 1994), citing *FDIC v. Henderson*, 940 F.2d 465, 474 (CA9 1991); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1407 (CA9 1989), cert. denied, 494 U.S. 1016 (1990). The Third and Tenth Circuits have formulated the standard as ignoring a foreseeable or obvious risk. *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 910 (CA3 1997); *Barrie v. Grand County, Utah*, 119 F.3d 862, 869 (CA10 1997).

The conduct of the Petitioners is far more egregious than a deliberate indifference standard would require.¹⁹ Nor does it fall with the area of close calls identified by the Supreme Court in *Lewis*. Here, Gabbert has alleged precisely that type of action which the Court held was most likely to give rise to a substantive due process claim, *i.e.*, conduct which is intended to injure and is unjustifiable by any government interest. See *County of Sacramento v. Lewis*, ___ U.S. ___, 118 S. Ct. 1708, 1711 (1998) (Kennedy, J., concurring). The actions here were not only unjustifiable by any legitimate interest, but were deliberately undertaken for the specific purpose of violating both Gabbert's and Baker's constitutional rights.

As the Ninth Circuit found, the prosecution's desire to gather evidence ran directly into "a defense attorney's right to consult with his client. The result is not a pretty picture. It is made all the worse because it appears to have been an entirely avoidable collision." (App. A to Pet. for Writ of Cert., p. 2.) Several reasonable alternatives were available. The prosecutors could have delayed the questioning of Baker until the search of Gabbert had been completed. It does not appear that the prosecution would have been disadvantaged by such a delay until they determined whether or not Gabbert had the letter. In fact, the obvious advantage in such a delay is that it would have given the prosecutors the ability to question Baker regarding the letter's contents if it had been obtained.

A second and far less intrusive alternative than the conduct employed here would have been the issuance of a subpoena *instantly* issued for Gabbert by the grand jury

¹⁹ As Judge Hawkins stated at oral argument in the Ninth Circuit, "if you describe what happened in this case to a stranger and didn't tell them what country it happened in, America is not the first place that would come to mind." (Appendix B, p. 22.)

foreperson. See, *e.g.*, *United States v. Johnson*, 615 F.2d 1125, 1128 (CA5 1980). Significantly, United States Department of Justice Guidelines recommend that prosecutors not execute a search warrant on a non-target attorney unless a less intrusive means of obtaining the materials is unavailable. 7 Dept. of Justice Manual § 9-19.220 (1992-2 Supp.). In fact, subpoenaing Gabbert would have been fully consonant with the obvious intent of the California legislature in enacting Penal Code section 1524(c)(1), for it requires that a non-target attorney subject to a search first be allowed to voluntarily turn over the documents sought by the search warrant and thereby terminate the search, effectively transforming the warrant's execution into the functional equivalent of the service of a subpoena. As we have discussed elsewhere, section 1524(c)(1)'s option was never made available to Gabbert either because the prosecutors and the special master were unaware of it or because they chose to ignore it.

While errors of judgment or mistaken actions do not violate due process, "malicious, irrational and plainly arbitrary" actions do. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1409 (CA9 1989). Conn and Najera's conduct in this case can only be characterized as malicious, irrational and plainly arbitrary.

II. A PROFESSIONAL'S RIGHT TO ADVISE HIS CLIENT FREE FROM GOVERNMENTAL INTERFERENCE IS CLEARLY ESTABLISHED

Recently, this Court held that the "clearly established" standard utilized in the civil rights context is akin to the requirement that criminal statutes give "fair warning" of the proscribed conduct. See *United States v. Lanier*, ___ U.S. ___, 117 S. Ct. 1219, 1224-25, 1227 (1997). While this Court has never specifically articulated a mechanical test to determine when a right is clearly established, it

has provided ample guidance. For instance, in *Lanier*, the Court stated that the law may be clearly established "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Lanier*, 117 S. Ct. at 1227. Further, "general statements of law are not inherently incapable of giving fair and clear warning. *Id.* Rather, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Id.*²⁰ The Court also acknowledged that decisions of courts of appeals, as well as other courts, may be adequate to provide sufficient notice to a defendant. *Id.* at 1227; see also *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (a court should use knowledge of its own precedents as well as other relevant precedents).

Petitioners contend that the Ninth Circuit adopted a new and faulty "common sense" standard to determine when a right is clearly established and that such a standard contradicts this Court's guidelines. However, the analysis employed by the Ninth Circuit is neither new nor inconsistent with the standards set forth by this Court or the analysis and reasoning employed by the Ninth and other Circuits. "Common sense," as used by the Ninth Circuit, simply refers to the principle that this Court has already articulated – that where either precedent or the obviousness of the violation itself demonstrates the illegality of the conduct, the right will be deemed to be clearly established. See *United States v.*

²⁰ For example, as the lower court commented in *Lanier*, the fact that no case has held that a welfare official cannot sell a child into slavery does not also mean that the welfare official would be immune from damages. *United States v. Lanier*, 73 F.3d 1380, 1410 (CA6 1996), cited in *United States v. Lanier*, ___ U.S. ___, 117 S. Ct. 1219, 1227 (1997).

Lanier, ___ U.S. ___, 117 S. Ct. 1219, 1224-25, 1227 (1997); see also *Casteel v. Pieschek*, 3 F.3d 1050, 1053 (CA7 1993) (when conduct so patently violates Constitution, closely analogous, pre-existing case law unnecessary); see generally *Newell v. Sauser*, 79 F.3d 115, 117 (CA9 1996) ("common sense and precedent" establish that due process requires fair notice of prohibited conduct).

Petitioners assert that instead of the standard articulated by this Court, one of two rules they propose should be adopted. First, Petitioners contend that only the decisions of this Court should be used to determine whether a right is clearly established. Alternately, they propose that the Court should adopt a "bright line" test for making such determinations. (Pet'r Br., pp. 36-47.) The Petitioners' suggestions ignore the practical realities of the administration of justice and, more importantly, would, if adopted, threaten to repeal the promise of section 1983: that every person who, under color of state law, causes any citizen to be deprived of any rights secured by the Constitution and laws, shall be liable for that violation. See 42 U.S.C. § 1983 (1995).

Unquestionably, the referent cannot be limited to Supreme Court precedent, if only for practical reasons, and the Court in *Lanier* and *Elder* rejected such a restrictive approach.

Petitioners' alternate suggestion, that the Court adopt a "bright line" test is equally unappealing. Structuring the qualified immunity analysis in the manner advanced by Petitioners would render the standard an insuperable barrier. See *Melton v. City of Oklahoma City*, 879 F.2d 706, 729 n.37 (CA10), cert. denied, 435 U.S. 932 (1978). Petitioners' rule would, in essence, require an exact factual correspondence between the case at issue and the particulars of a specific, available precedent. In essence, Petitioners ask the Court to adopt a standard of criminal recklessness, as opposed to the less rigid, but nonetheless objective, standard applied in this Court's

prior cases. See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.") While this Court has held that such a standard may be appropriate in Eighth Amendment cases, it has specifically rejected its application to other types of due process violations. See *Farmer v. Brennan*, 511 U.S. 825, 845-47 (1994).

Because section 1983 "may offer the only realistic avenue for vindication of constitutional guarantees," *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), neither this Court nor the circuit courts have required the level of precision urged by the Petitioners. As the Third Circuit has commented: "insisting on precise factual correspondence between the conduct at issue and reported case law is tantamount to permitting officials one liability-free violation of a constitutional or statutory right." *People of Three Mile Island v. Nuclear Regulatory Comm'rs*, 747 F.2d 139, 145 (1984); see also *Chew v. Gates*, 27 F.3d 1432, 1449-50 (CA9 1994) (fact that new tactic is used by government does not mean that clearly established constitutional right has not been violated). Similarly, the Sixth Circuit in the context of a substantive due process claim, stated:

While . . . there is a good deal of uncertainty with regard to the precise contours of substantive due process, it does not follow that state actors are insulated from liability on all such claims, no matter what the underlying facts may be. The fact that the law may have been unclear, or even hotly disputed, at the margins does not afford state actors immunity from suit where their actions violate the heartland of the constitutional guarantee, as that guarantee was understood at the time of the violation. Stated differently, it is simply irrelevant that the definition of the right to substantive due process has

been in flux if, under any definition found in the case law at the time, the defendants should have known . . . that their actions violated that right.

Stemler v. City of Florence, 126 F.3d 856, 867 (CA6 1997) (footnote omitted).

In this case, the constitutional rights at issue are clear. A lawyer has a Fourteenth Amendment right to represent his client at a critical proceeding before a tribunal and a corresponding First Amendment right to communicate advice to his client in connection with that representation. Moreover, he has a right to fulfill these professional obligations without unreasonable government interference that would altogether preclude him from counseling the client during the proceedings. Even in the absence of more specific case law, these rules applied with "obvious clarity" to the prosecutors conduct and were, thus, clearly established.²¹

More particularized case law, however, did exist and did give notice to the prosecutors that their conduct violated Gabbert's constitutional rights. *Keker*, and the cases upon which it relies,²² plainly stand for the proposition that the government may not interfere with the right

²¹ The Ninth Circuit observed that "[t]he unusual facts of this case preclude 'the very action in question' to be clearly established in our case law. Nevertheless, long-standing precedent establishes the importance of the attorney-client relationship during a client's grand jury testimony." (App. A to Pet. for Writ of Cert., pp. 12-13.)

²² *Keker* is a concrete, fact-laden illustration of the governing constitutional principles. Even if *Keker* were the only applicable law extant, it would still suffice to render the right clearly established. See, e.g., *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (CA9 1986), cert. denied, 483 U.S. 1020 (1987) (court should look to all available decisional law, including district courts); see also *Wood v. Ostrander*, 879 F.2d 583, 591 (CA9 1989), cert. denied, 498 U.S. 938 (1990) (court should look to all decisional law); accord *Romero v. Kitsap*, 931 F.2d 624 (CA9 1991);

of a professional to give advice to a client during a proceeding at which the client's constitutional rights are at risk and she is entitled to the advice of the attorney to safeguard them. Unquestionably, this right is deeply rooted in law, in customs, and in the practical aspects of our accusatorial system of criminal justice. The applicability of these principles requires no legal prognostication of the part of the government officials in this case. Moreover, Petitioners themselves are lawyers. They, as veteran prosecutors, should certainly be charged with the knowledge of the constitutional principles governing attorney-client relationships in a grand jury setting. In any event, neither their ignorance nor defiance of the clearly established governing law operates to immunize their misconduct.

CONCLUSION

For the foregoing reasons, the ruling of the Ninth Circuit should be affirmed.

Respectfully submitted,

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Klock v. Cain, 813 F. Supp. 1430, 1431 (C.D. Cal. 1993) (officials charged with knowledge of all available case law).

APPENDIX A

STATE STATUTES ALLOWING COUNSEL INSIDE THE GRAND JURY ROOM

ARIZONA: Persons under investigation are allowed presence of counsel while they testify. Ariz. Rev. Stat. Ann., Rules of Crim. Proc., Rule 12.6 (West 1996)

COLORADO: Any witness is allowed assistance of counsel during questioning. Colo. Rev. Stat., Rules of Crim. Proc., Rule 6.2(b) (1984)

CONNECTICUT: Any witness is allowed assistance of counsel during questioning. Conn. Gen. Stat. § 54-47f.(d) (1997)

FLORIDA: Any witness is permitted to have an attorney present during questioning. Fla. Stat. § 905.17(2) (1997)

ILLINOIS: Any witness has the right to be accompanied by counsel during questioning. 725 Ill. Comp. Stat. 5/112-4.1 (West 1996)

INDIANA: Persons under investigation are allowed to consult with an attorney, and court will appoint counsel for any such parties who cannot afford their own. Ind. Code § 35-34-2-5.5 (1993)

KANSAS: Any witness is allowed to have counsel present during questioning, and court will appoint counsel for those unable to afford their own. Kan. Stat. Ann. § 22-3009 (1995)

LOUISIANA: Persons under investigation may be accompanied by counsel during their testimony. La. Code Crim. Proc. Ann. art. 433 (West 1998)

MASSACHUSETTS: Any witness is allowed to have counsel present in the grand jury room. Mass. Gen. Laws Ann., Rules of Crim. Proc., Rule 5(c) (West 1995)

MICHIGAN: Any witness has the right to presence of counsel in the grand jury room. Michigan Stat. Ann. § 28.959(5) (Law. Co-op. 1996)

NEBRASKA: Any witness is entitled to assistance of counsel during questioning by the grand jury. Neb. Rev. Stat. § 29-1411(2) (1995)

NEVADA: Persons under investigation are entitled to assistance of counsel while appearing before the grand jury. Nev. Rev. Stat. § 172.239 (1995)

NEW MEXICO: Persons under investigation are entitled to the presence of counsel in the grand jury room. N.M. Stat. Ann. § 6-4 (Michie 1984)

NEW YORK: Any witness willing to waive immunity is entitled to be accompanied by counsel, and court will provide counsel to parties who cannot afford their own. N.Y. Crim. Proc. Law § 190.12(1) (McKinney 1993)

OKLAHOMA: Any witness is entitled to the presence of counsel while testifying. Okla. Stat. Ann. tit. 22, § 340 (West 1992)

PENNSYLVANIA: Any witness is entitled to the presence of counsel, and the court will provide counsel for those unable to afford their own. 42 Pa. Con. Stat. § 4549(c) (1992)

SOUTH DAKOTA: Any witness may have the presence of counsel while appearing before the grand jury. S.D. Codified Laws, § 23A-5-11 (Michie 1998)

TENNESSEE: Formally codifies the right of any witness to leave the grand jury room for consultations with his attorney. Tenn. Code Ann. § 40-12-216 (1998)

UTAH: Any witness has the right to be represented by counsel. Utah Code Ann. § 77-10a-13(4)(a) (1998)

WASHINGTON: Any witness may be accompanied by counsel unless given immunity; witnesses testifying under immunity may still leave the grand jury room during questioning to consult with an attorney. Wash. Rev. Code § 10.27.120 (1998)

WISCONSIN: Any witness appearing before the grand jury may have counsel present. Wisc. Stat. § 756.145 (1993-94)

APPENDIX B

[p. 2] UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL L. GABBERT,)	
Plaintiff-Appellant,	)	No. 95-56610
)	
vs.	)	D.C. NO. CV-
	)	94-04227-RSWL
DAVID CONN; CAROL NAJERA;)	
LESLIE ZOELLER; ELLIOT)	
OPPENHEIM,)	
)	
Defendants-Appellees,)	
)	

Reporter's Transcript Of Audiocassette
Recording Of Proceedings

September 11, 1997 - Pasadena, California

Before: Harry Pregerson and
Michael Daly Hawkins, Circuit Judges,
and Charles R. Weiner,* District Judge

DEBRA L. VENTURA, CSR 9860
Deposition Reporter
744 East Walnut Street
Pasadena, California 91101

* Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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[p. 4] PASADENA, CALIFORNIA; SEPTEMBER 11, 1997 9:00 A.M.	

THE COURT: *Gabbert vs. Conn.*

MR. LIGHTFOOT: Good morning, your Honors. May it please the Court, I'm Michael Lightfoot. I am representing Paul Gabbert, who is present in court today. He is the plaintiff and appellant in this case. Mr. Gabbert is a criminal defense attorney here in Los Angeles and has been for many years.

Three years ago, Mr. Gabbert was retained by a young woman to represent her with respect to an investigation of her as a target in a Los Angeles County grand jury investigation.

THE COURT: We've read the briefs. I think we know what the facts are. What is the clearly established right that your client believes was violated?

MR. LIGHTFOOT: The right to practice his chosen profession.

On the morning of Monday, March the 21st -

THE COURT: Again, we've read the briefs. We understand that they served a search warrant at what [p. 5] apparently was the exact time his client was supposed to appear in front of a grand jury.

MR. LIGHTFOOT: That's correct, your Honor.

THE COURT: Which, when I read these briefs, I would have thought that the clearly established right that you would have focused on – doesn't mean I'm right or wrong – would have been an interference with his ability to communicate with his client and advise her, as was her right, to seek advice from her counsel during her grand jury appearance.

MR. LIGHTFOOT: Well –

THE COURT: Now, do I have that wrong?

MR. LIGHTFOOT: No, you – you asked me to specify the right. I specify the right as it's stated in Supreme Court cases. But the foundation of that right is the freedom from intrusion into the attorney-client relationship. I can't – other than the function that a criminal defense attorney performs in the course of a trial of somebody accused of a crime, it's hard to imagine a more significant role that a criminal defense attorney plays than that that was hopefully to be played by Mr. Gabbert that morning at the Grand Jury.

Because he – as your Honors know, she had received a subpoena through him the previous [p. 6] Thursday. He had attempted to file a motion to quash it on what appear to be clear Fifth Amendment grounds, at least Fifth Amendment production grounds. When the D.A. received notice of that, the two D.A.s and the Beverly Hills police officer went right to a judge in Los Angeles County court on Friday afternoon, proceeded down to her residence that Friday night in Orange County, executed a search warrant specifying the exact same document that was specified in the subpoena that had been served the day before.

When Mr. Gabbert gets up to the Grand Jury, he is standing with his client, and the prosecutors tell him in the presence of his client that she's a target, she's a perjury target. He discusses immunity.

THE COURT: Listen, I have –

MR. LIGHTFOOT: What I'm trying to –

THE COURT: I have no question but that the facts present a picture apparently where the search warrant is timed to be executed at the very time the client is appearing before the Grand Jury. I have no problem with that at all.

MR. LIGHTFOOT: All right. Well –

THE COURT: Let me tell you why I ask that question.

[p. 7] MR. LIGHTFOOT: Okay.

THE COURT: Because if that's the right that was interfered with, how do you deal with your client's statement in his own deposition that the first time she comes out of the grand jury room and the search warrant is being executed, and she's coming to him to seek his advice, and he's told that she's there, he says – and, you know, this is his words describing his own words at the time.

He said, "She said, 'Your client wants to talk to you.' "And I said, 'I can't talk to her right now. I'm being searched.'

"And she says, 'She has to talk to you right now because she has to go back in the Grand Jury.' And in this context it was clear it was urgent.

"I said, in effect, That's tough. They created this situation. They can wait as long as it takes."

MR. LIGHTFOOT: Your Honor –

THE COURT: How can he complain that his [p. 8] ability to communicate with his client, who needed his advice, was being impaired when he tells them, Look it. I don't want to talk with her?

MR. LIGHTFOOT: He was the subject of the execution of a search warrant. He doesn't – the subject of a search warrant doesn't have the right to say to the person executing the warrant, I'm going to leave here. You're not going to perform the search because I have something else to do.

When the search was originally started by the 80-year-old Special Master, according to the California provision in the Penal Code Section 1524, specifically if the lawyer says to the Master, these documents are privileged, it has to stop. So he had said to the Master –

THE COURT: I've got – believe me. I've got some questions for your opponents in the case. But my question which I still have is: If the real hub of the problem here was that the search warrant was executed at the very time the client needed advice from her lawyer, doesn't the passage I read to you from your client's own deposition suggested that he caused that conflict by his own actions?

MR. LIGHTFOOT: I don't think so, your Honor. I think that –

[p. 9] THE COURT: When he tells them, Look it. I don't want to talk with her. They are searching right now. I don't want to give her advice.

MR. LIGHTFOOT: He did want to talk with her. He couldn't talk with her because he was being searched.

It's like saying – it's like if he had come up on the elevator with his client, and as the client got off the elevator, they locked him in the elevator, he can't get in there. He's physically obstructed from getting in to assist her. He's being searched by an officer of the Court, somebody who has been directed by a judicial officer to conduct a search.

THE COURT: Does the record show that he was – that if he had wanted to talk with her at that moment that he was physically restrained from doing so?

MR. LIGHTFOOT: Well, I don't think the record speaks to that, but I think the Court could take judicial notice of the fact that an individual is not free to leave the area when his person is being searched or his effects are being searched.

THE COURT: The person who apparently comes in the door is D.A. Conn's secretary –

MR. LIGHTFOOT: Ms. Fairbanks.

THE COURT: – who knocks on the door where your client is with the 80-year-old Special Master, and [p. 10] the secretary says, "Your client needs to talk to you. She says it's urgent."

MR. LIGHTFOOT: That's right.

THE COURT: Why can't he talk with her?

MR. LIGHTFOOT: Because he's being searched, your Honor. He's not free to leave – to leave the vicinity where the search is taking place. He's the one whose – his – the warrant calls for the search of his person.

JUDGE 2: Answer a question for me, Mr. Lightfoot, if you would please.

MR. LIGHTFOOT: Yes, your Honor.

JUDGE 2: Why does the client, his client then go back to the grand jury room and say, "On advice of counsel, I spoke to my counsel, and this is what I'm going to do"?

MR. LIGHTFOOT: Because in her deposition she said she came out. She was frightened beyond words. She wasn't sure why she got the message. It may have been body language from Mr. Gabbert. She's not sure. But the message to her was - in this state of fright - go back and invoke the Fifth Amendment. And she does that. And then they ask her the same question again.

It's hard to imagine a question -

[p. 11] JUDGE 3: She could see her attorney through a glass window.

MR. LIGHTFOOT: Yes, that's correct, your Honor. She said three to five car lengths away. And then I think Mr. Gabbert said it was a room approximately 40 foot away from the grand jury room.

JUDGE 2: Could she have gone back to the grand jury and said, I didn't have a chance to talk to my lawyer. He's being searched?

MR. LIGHTFOOT: You know, your Honor, this is a young woman with no legal experience sitting in a - she thought there was 50 people in there. That's an exaggeration because there are only 23 then the two prosecutors. But this is a - this is a - to put it mildly, probably the

most frightening experience in the legal system that she or any other witness could have.

She has just been told that she's a target. They've talked about whether she's going to be arrested or whether she's going to be allowed to surrender. She said that thoughts that were going through her mind was is she going to be arrested. Her only rock is now being searched by somebody 40 feet away. She is thinking to herself, how am I going to get bail.

That is not the way our system is [p. 12] supposed to operate.

JUDGE 2: Well, if she went back to the Grand Jury and said, I couldn't talk to my lawyer, therefore, I can't answer your question. I can't do anything until my lawyer is in a position to counsel me.

MR. LIGHTFOOT: Well, you know what, your Honor, maybe if she was brighter, she should have said that. But what she did was she did the best she could. She obviously -

THE COURT: Which wasn't bad.

MR. LIGHTFOOT: Which wasn't bad at all. And then what happens is they ask, "Do you know Lyle Menendez?" It's hard to imagine a question that's more incriminating. And to a sophisticated D.A., if she answers it, she probably opens the door and waives the privilege to other questions.

And she says again, "I've got to go out, and I have to talk to my lawyer."

Then she comes back in, and she says that Mr. Conn gets angry and threatens to hold her in contempt. She was actually held in contempt - formally held in contempt by the grand jury foreperson.

I didn't understand that a foreperson had that power. I thought a judge had to do that.

[p. 13] JUDGE 2: Only in California.

MR. LIGHTFOOT: Only - only in a downtown court. Not in a federal building, your Honor. I can assure you of that.

But I can't imagine a more intimidating situation. And it's clear what the intent of the prosecutors were. The warrant itself that they got that morning - you know, they lulled Mr. Gabbert into thinking they were writing an immunity letter, as you know from the briefs from the record.

And so he is down there with his client thinking they're going to give them at least use immunity. They come with a search warrant not just for him. A search warrant for his person and effects, and the same warrant calls for a search warrant, a search of her person.

JUDGE 2: Didn't she tell them she had this letter?

MR. LIGHTFOOT: She told them that - she told them on Friday night. Is that what you are talking about, your Honor?

JUDGE 2: Yes, sir.

MR. LIGHTFOOT: That she had given documents to her lawyer. That's what she had told them.

JUDGE 2: Right. And among those documents was [p. 14] this letter that they were looking for.

MR. LIGHTFOOT: Well, I don't know that she told them that. She said all the documents that she had she had given to Mr. Gabbert.

JUDGE 2: Well, concerning this case.

MR. LIGHTFOOT: That's what the application says.

THE COURT: Well, there is this difference between two pages of the letter and the full letter. I sort of picked that up from -

MR. LIGHTFOOT: Well, Mr. Gabbert, in his deposition and in the Complaint indicates that he had two pages - copies. A copy -

THE COURT: Of two pages.

MR. LIGHTFOOT: - of two pages.

THE COURT: Which it turns out is exactly what the prosecutor said.

MR. LIGHTFOOT: Well, but he - it was his testimony that he actually gave it to the Master.

THE COURT: What they were looking for though was the full letter.

MR. LIGHTFOOT: Right.

THE COURT: That was the object of their search.

MR. LIGHTFOOT: That was never – that was [p. 15] never disclosed pursuant to warrant or any other method.

JUDGE 2: Shouldn't she have told her attorney that that's what she told them?

MR. LIGHTFOOT: I'm sorry, your Honor?

JUDGE 2: She didn't tell her attorney that that's what she told them?

MR. LIGHTFOOT: No, she didn't tell – she didn't tell them that on Friday night.

JUDGE 2: That's what I'm saying.

MR. LIGHTFOOT: Yeah.

JUDGE 2: She never bothered to tell him.

MR. LIGHTFOOT: You know, part of this whole course of conduct starts with a Thursday and the Friday night visit when they fully know that she's represented by a lawyer, who is going to contest the production of documents vigorously. And the lawyers go down there with the police officer and commit a gross violation of the Code of Professional Conduct in California by talking to her, the target of grand jury investigation, who they know is represented by an attorney.

Now, let me just get back to the point that you raise, Judge Weiner, that when they – when they came back to the environs of the grand jury with a search warrant, they had a warrant to search both [p. 16] Mr. Gabbert and Ms. Baker. And they had the Master, who is delegated by the judge to search Mr. Gabbert. And Mr. Zoeller, the Beverly

Hills police officer, was there to search, if they wanted to do this, to search the client.

They weren't interested in searching her. What they were interested in was to separate the two, get him out of the way, bring her into the Grand Jury. They didn't ask her as the first question, Did you bring the document with you that is listed in the Subpoena Duces Tecum. They asked her for substantive information about her relationship with the primary defendant. So it's clear what they were trying to do here. They were using this as a pretext, this – this search.

THE COURT: We don't know what their intent was because they pretty consistently throughout this case refused to answer questions like that.

MR. LIGHTFOOT: Well, we – you know, we're here –

THE COURT: We can make inferences.

MR. LIGHTFOOT: And I think that, you know, where we are here after trial court dismissed our complaint, almost all of it, and then we lost the rest of it on summary judgment. We make inferences in favor [p. 17] of the evidence and inferences that we suggest.

THE COURT: You are certainly entitled to those. There is no question.

MR. LIGHTFOOT: But I say – I go back to the facts to suggest to the Court that I think it's fairly clear what they were doing here. That they were trying to get her into a position where she had to answer questions. And they knew that if Mr. Gabbert was there, because of the zeal he had already expressed in his – the motion that

he tried to file on Friday in his attempts to get them to grant her immunity before she said anything, that he was going to be an absolute obstacle to their doing that.

Now, I can't imagine a grosser interference with a lawyer's attempt to practice his profession. And it's one thing to say that, you know, you can't step in the way of a lawyer giving advice to a bankruptcy client. It's another thing to say that - here's a woman who is a target of a perjury investigation, who could very well be giving up the last pieces of information that fit the puzzle that give them the probable cause to seek an indictment, and say at that moment in time - where you don't have your lawyer able to be with you in the Grand Jury - we're not even going to let you go out and talk to him.

[p. 18] It's hard to imagine invading the relationship more than that.

THE COURT: Did anybody ever tell the client that she couldn't go out and talk with her lawyer?

MR. LIGHTFOOT: No, they never - no, they never said that.

THE COURT: That's what you just argued.

MR. LIGHTFOOT: Well, effectively, she went out the first time. She saw through the glass. She saw Mr. Gabbert.

THE COURT: I understand that. Again, we've all read the record.

MR. LIGHTFOOT: No, but -

THE COURT: I just want to be clear about that. At no point in time did any police officer or D.A. tell her, "You can't talk" (inaudible) -

MR. LIGHTFOOT: They never said that specifically. But the second time she went out, she didn't see him. She sat there. And she sat there for what she said was an eternity. Waiting. Waiting. Because she told them she wanted to talk to her lawyer. He never arrived.

She was then ordered to go back into the Grand Jury. And at that time she again invoked the Fifth, and that's when Mr. Conn got angry and told her [p. 19] he was going to have her held in contempt.

So I answered your question directly. It's an interference with his right to practice law. We're not litigating her, if she had one. I don't even know if she had one, a Sixth Amendment right at that point. We're not arguing they violated any grand jury norms or anything like that. We're not claiming that it's a defamation case. It's plain and simple interference with his right to practice his chosen profession.

And I have four minutes, and I will save those for rebuttal your Honor.

THE COURT: Thank you.

MR. MAC LATCHIE: Good morning, your Honors. May it please the Court, I am Scott MacLatchie. I represent Detective Zoeller, and Special Master Elliot Oppenheim.

I understand from comment Judge Hawkins made that Judge Hawkins had some questions regarding the carrying out of the search.

THE COURT: Yeah, why didn't you follow the statute? Why didn't you comply with the statute, your client?

MR. MAC LATCHIE: And you are referring to Detective Zoeller or Mr. Oppenheim?

[p. 20] THE COURT: I'm referring to everybody involved in this interesting affair. The statute, the California statute simply wasn't observed.

Isn't that true?

MR. MAC LATCHIE: It - well, I would, if taking what plaintiff says as -

THE COURT: Let's take it one step at a time, Counsel.

No. 1, the statute gives the object of the search the absolute right to say, I think these documents are privileges. Put them in an envelope and take them to a judge.

Isn't that correct?

MR. MAC LATCHIE: The statute does say, your Honor, that documents for which an assertion is made, that the determination of whether they shall be disclosed or not shall be made by a judge.

THE COURT: Not by this 80-year-old Special Master; right?

MR. MAC LATCHIE: That is correct. The determination whether to -

THE COURT: And that did not happen here. In fact, he went through Mr. Gabbert's files, including his

files from other cases. He had files with him that related to other clients, which by no stretch of the [p. 21] imagination were the business of the District Attorney. Isn't that correct?

MR. MAC LATCHIE: Mr. - according to the plaintiff, he says that that occurred. There is also evidence in the record that it was a quick flipping through. And then by the plaintiff, "Well, this is what I have."

He became -

THE COURT: Listen, the D.A. had no business looking at client files related to other clients, whether they flipped through it or took photocopies of it.

Isn't that correct?

MR. MAC LATCHIE: I would agree with that, your Honor, yes.

THE COURT: Okay. Let's deal with the second part of what this statute requires.

This statute says that once there is an assertion - first of all - second of all, the statute says only the Special Master may conduct the search; right?

MR. MAC LATCHIE: Yes, your Honor.

THE COURT: Without the consent of the object of the search; right?

[p. 22] MR. MAC LATCHIE: That's correct, your Honor.

THE COURT: That consent was never given.

MR. MAC LATCHIE: That - the consent was never given for the Special Master.

THE COURT: And despite that – despite that, there was a second search of this lawyer's briefcase and person, wasn't there?

MR. MAC LATCHIE: If you are referring to by Detective Zoeller looking at it, yes, that is alleged.

THE COURT: Okay. And that was a violation of the statute; right?

MR. MAC LATCHIE: That would be inconsistent with the mandate of the statute, yes, to have someone other than the Special Master look at it.

And I would, for purposes of being here today and for purposes of the District Court's rulings, I would concede that there was not technical compliance.

Although I might add, although maybe it's not the point to argue it here, that with regard to the first violation that your Honor has brought up or perceived –

THE COURT: Counsel, how can you argue lack of technical compliance when it looks like this statute was simply ignored?

[p. 23] MR. MAC LATCHIE: Only – only as to this, your Honor. I think that there is an assumption that has been made here that for a statute – well, particularly this statute – that if the object of the search indicates, I have documents in here that are privileged, and I don't want these being – these should not be disclosed, I think that the very nature of having a judicially appointed Special Master is to – well, for No. 1, let's say the object of the search says, "I don't have what's relevant here." The statute empowers the Special Master to overrule that and still look through.

I think that statute allows the Special Master – and, I agree, only the Special Master – to look through what's there. And even if something is alleged to be privileged, the Special Master – I don't think the statute says that the Special Master can't look at it.

I think that the statute is clear that if the Special Master feels that it should be turned over to the investigating officer or the party issuing the warrant, that then – and then it must be sealed and taken to the Judge. But I don't believe that the statute necessarily means that the Special Master, as soon as the object of the search says, "I have [p. 24] privileged documents," can't at least look and see.

Maybe those privileged documents, when the Special Master looks at it, has no bearing on the case, and, therefore, he'd say, "Fine. I don't even want to take those and burden the Judge."

THE COURT: How would he know that if he's just taking a glance? He'd have to read all that stuff.

MR. MAC LATCHIE: And in this case, maybe he should have been more thorough, which according to them would have worked only a more egregious violation.

THE COURT: His office should have had more respect for California law.

MR. MAC LATCHIE: Your Honor –

THE COURT: That's a pretty rotten thing to do to get a lawyer in a room and search him with a Special Master while a client goes before a Grand Jury.

I mean, is that something that the D.A.'s office is proud of?

MR. LIGHTFOOT: Your Honor, I don't know. And that same question may be addressed to my cocounsel who represents the D.A.s here.

I do know that, as the Court noted, we were dealing here with probably an ignorant – ignorant of specifics of a volunteer retired lawyer, who maybe got in over his head on this.

[p. 25] THE COURT: (Inaudible) the district attorneys were there, weren't they?

MR. MAC LATCHIE: I don't believe at the moment that the search was carried out they were there. I believe at least –

THE COURT: They were there the second time.

MR. MAC LATCHIE: I know Detective Zoeller was –

JUDGE 2: (Inaudible) were there. He was trying to talk to his lawyer. Now, why wouldn't they know – or had a opportunity to speak with her out of their hearing?

MR. MAC LATCHIE: Your Honor, I believe that the district attorneys were – one or both of them were at the grand jury room, and this was –

JUDGE 2: But they knew this was going on. I mean, they were not without knowledge.

MR. MAC LATCHIE: Oh, I'm sure they were aware that this was going on, your Honor.

JUDGE 2: When the woman walked out of the room, and they knew that the lawyer was being searched, how could he possibly communicate with her? How could he possibly counsel her or give her advice when all this was going on at the same time? Why would they have said to the people, "Let him go out and talk with [p. 26] her"?

MR. MAC LATCHIE: When she came out, apparently she wanted to talk to him, and that communicated to him, there is absolutely no evidence –

JUDGE 2: Yeah, but he couldn't get away. How could he walk away from that?

MR. MAC LATCHIE: There is absolutely no evidence he asked to leave. And if he asked to leave, was prevented from doing so. In these surroundings, we're not taking about a jail lockup. We're talking about a room open to the public, off a corridor, in a courthouse.

THE COURT: Here's my picture of what we had going on here, and you tell me if I'm wrong.

You have the right of the People, through the District Attorney and the police, to conduct an investigation that is ancillary to a very serious crime. They are looking for evidence that relates to it. We're between trial one and two, and they are looking for evidence –

JUDGE 2: In a high publicity case.

THE COURT: – in a high publicity case.

You've got a defendant – you've got a woman and an attorney. She's been called to the Grand Jury. She's been given a Subpoena Duces Tecum. She's [p. 27] supposed to

appear in front of the Grand Jury. She's got an obligation to appear and to testify, but also to have the advice of counsel. So you have these two competing interests.

Was there anything in the world that would have prevented the County Attorney from delaying her Grand Jury appearance until this warrant had been fully executed?

MR. MAC LATCHIE: The answer from my perspective, your Honor, is I don't know. I have not spoken to the County Attorneys. They were not my client. I have no information concerning the particular timing or if there were other matters behind this.

THE COURT: They were asked - they were asked that in Discovery in this case, and they refused to answer.

MR. MAC LATCHIE: I don't know the answer, your Honor.

THE COURT: So under the rules that we normally apply where a case is in this posture, how should we treat that?

MR. MAC LATCHIE: Treat whether -

THE COURT: The County's refusal to provide any reason when they were directly asked in Discovery, why [p. 28] couldn't you have delayed Ms. Baker's grand jury appearance while you carried out this search?

MR. MAC LATCHIE: I believe that in the posture we are here on, your Honor, is whether there was an actionable violation of - well, certainly of Mr. Gabbert's right.

JUDGE 2: Mr. MacLatchie, you're not answering Judge Hawkins' question.

MR. MAC LATCHIE: Well -

JUDGE 2: I mean, there is no reason in the world why they couldn't have delay the search -

MR. MAC LATCHIE: And.

JUDGE 2: - unless they wanted to create a problem between the witness - the client and the attorney.

What reason could there be? Think of one.

MR. MAC LATCHIE: I don't know, your Honor. Standing -

JUDGE 2: I'll give you an hour to think of one and come back while we deal with these other cases.

MR. MAC LATCHIE: Your Honor, I would - I cannot -

JUDGE 2: Give one plausible reason.

MR. MAC LATCHIE: Simply to work through the [p. 29] matter, and the fact that maybe there was another matter pending before the Grand Jury. I don't know.

JUDGE 2: To save time?

MR. MAC LATCHIE: Possibly.

THE COURT: I mean, if you describe what happened in this case to a stranger and didn't tell them what country it happened in, America is not the first place that would come to mind.

MR. MAC LATCHIE: Your Honor, I want to allow time for my cocounsel to speak.

I would just add that -

JUDGE 2: We'll give you more time.

MR. MAC LATCHIE: All right, your Honor. I would - I would add that with regard to whatever motivation, whatever rational was behind the District Attorney's thoughts in proceeding in this manner, I don't believe though addresses the liability issue here, the liability issue being whether there was a violation of the Fourth Amendment.

THE COURT: The Complaint alleges that they acted in utter disregard and disrespect of Ms. Baker's right to deal with her lawyer and her lawyer's right to carry out his profession. And we must assume those allegations to be true, especially in the face of the County refusing to provide a justification.

[p. 30] This case has been on the docket for a long time. It's been scheduled for oral argument for a long time. You're a bright and capable lawyer. You can't think of a reason that would justify this timing?

MR. MAC LATCHIE: And to be honest with you, your Honor, maybe I should have anticipated that and given it some thought. I - because the control of that aspect of it was not involving my clients, and I was - I did not think of that and cogitate on that issue. But I -

THE COURT: Maybe your - maybe your cocounsel could answer.

MR. MAC LATCHIE: I would just like to - I would just like to close with this. I believe though that this right, this Fourteenth Amendment right we're talking about - and certainly it's in the briefs, I won't argue that. We don't believe that District Court case, that Caker case, which plaintiff relies on, clearly establishes a right. Certainly is not within Anderson (inaudible) and Kraden's perimeters to the facts of this case. I would just point out that the - the nature of what is alleged does not rise to the level of a constitutional violation sufficient to deny qualified [p. 31] immunity to Detective Zoeller and to Mr. Oppenheim.

Thank you, your Honor.

THE COURT: Thank you.

MR. RENICK: Good morning, your Honors. I'm Steven Renick, representing David Conn and Carol Najera.

THE COURT: We probably should have directed some of these questions to you. And we fired some pretty hot and hard ones at your cocounsel.

You did a very good job at responding to them, I thought.

MR. RENICK: And I do appreciate him taking the initial flak.

THE COURT: So you could sit - now, you've had not only the chance of all these years preparing for oral argument and the like, but you've sat here and watched him tell us what the justification could have been.

Why couldn't the County Attorney, the District Attorney have delayed Ms. Baker's Grand Jury appearance while they executed the warrant?

MR. RENICK: Well, I have two answers to that. The first one is that David Conn, in the course of the litigation - I'm not sure whether it was a deposition, a Declaration attached to this -

[p. 32] THE COURT: I can barely hear you.

MR. RENICK: I'm sorry. David Conn explained in the course of the litigation, either in a Declaration and a deposition - I'm not quite sure where - that they didn't even prepare the search warrant for Mr. Gabbert and Ms. Baker until after they arrived at the grand jury room.

But frankly, I don't think we need -

THE COURT: That's a nonanswer.

MR. RENICK: Well -

THE COURT: I mean, this is - this is real easy to answer. You have a warrant you want to execute. You are going to serve it on the lawyer. You know there are special procedures involved. Put aside for the moment that you don't even follow them. But you've got a client of that lawyer who is going to appear in front of the Grand Jury. The act of serving the warrant and executing it prevents him from communicating - allegedly under the Complaint - with his client.

The solution seems obvious. Why not delay her appearance while you execute the warrant, even if you need to isolate the two of them?

MR. RENICK: The answer ultimately is is that [p. 33] it's a solution in search of a problem. The bottom line -

JUDGE 2: (Inaudible.)

MR. RENICK: It's a solution in search of a problem. Because the bottom line here is that we give prosecutors a certain amount of leeway to try and make their cases. I'd ask -

THE COURT: Suppose these prosecutors had found out by looking at the computer Mr. Gabbert had an outstanding traffic warrant. And they called the police department and said, "Gabbert's going to be pulling up in his Mercedes at the courthouse" - or his Chevy, or whatever it is. "There is an outstanding warrant. Arrest him. Take him down to County lockup, and keep him there while his client is in the Grand Jury."

Could they have done that?

MR. RENICK: I'm not sure, your Honor. And I'm not willing to go into that because that's not factually analogist to this case. And I would like to refer -

THE COURT: You know what? I get to answer the questions - ask the questions. You get to answer them.

MR. RENICK: I'm sorry, your Honor.

[p. 34] THE COURT: If you don't like my questions, that's your problem.

What about my hypothetical? Could they have done that?

MR. RENICK: Probably.

THE COURT: That would have been okay?

MR. RENICK: I don't think it would have been okay in the sense of your Honor's comment about which country are we in. I'm not going to defend.

If indeed the District Attorneys were acting in what might be called a devious manner, I'm not going to defend that. I'm not going to state to this Court that that is acting in the highest, you know, ethical guidelines of our profession.

But that's a far different matter than saying it's illegal, or contrary to statute, or constitutes a constitutional violation. And the reason -

THE COURT: We still have this question that's screaming out to be answered that neither of you have answered.

Why couldn't they have delayed the Grand Jury appearance?

MR. RENICK: Because they chose not to.

THE COURT: Okay.

[p. 35] MR. RENICK: And -

THE COURT: And why did they choose not to?

MR. RENICK: Probably to take advantage and - I mean, without getting into whether or not that's - in fact, let's assume that they were doing that to take advantage.

JUDGE 3: Take advantage of what?

MR. RENICK: Of the nervousness of the client, the distraction this would cause to the attorney.

I'd ask you to imagine for a moment that we're not dealing with a witness and her attorney, but we're dealing with an organized crime figure, and their well-connected attorney, and a prosecutor who has been trying, you know, vigorously to get somebody to be willing to testify.

THE COURT: It doesn't matter if that grand jury witness is the hit man for the Lucazzi family and the lawyer is a made member of that family. They still have a - that witness still has a right to come out of the Grand Jury, consult with a lawyer.

And the question is: Is there any pretext, any conceivable reason that would permit prosecutive authorities to interfere in the way they did here with that right?

MR. RENICK: That's the problem, your Honor, is [p. 36] when you say, as they did here, that isn't correct. If I may refer to Mr. Gabbert's own deposition testimony -

THE COURT: I've already read that to your opposing counsel.

MR. RENICK: No, not that one. Not that one.

THE COURT: Oh, you have something else?

MR. RENICK: Yes. When they were served with the warrant - this is on Page 13 of the excerpt of records. No it's - I'm sorry, your Honor - Page 352 of the excerpt of records.

"They'd entered into the empty room." Mr. Gabbert says, "Detective Zoeller then presented me with a search warrant. Served a search warrant on me for my briefcase and person, and Ms. Baker's person."

"QUESTION: What happens next?"

"I don't know if this is precise chronology, but within seconds, Ms. Baker was called before the Grand Jury."

"Who called her before the [p. 37] Grand Jury?"

"I don't know whether it was a foreperson or Mr. Conn. I was introduced to Mr. Oppenheim, who was a Special Master. I said, 'We'll need a private room.'"

The only reason Mr. Gabbert left the door to the Grand Jury room was because he chose to leave it.

THE COURT: What do you want him to do? You want him to stand out in front of the jury room, be searched, have his pockets turned inside out, go through his briefcase in a public area where other people can see all of this?

MR. RENICK: Yes. If his concern -

THE COURT: That's what he should have done?

MR. RENICK: If his concern was his client, if his -

THE COURT: Strip me naked right here. That's all right.

MR. RENICK: If necessary. If the issue here, as your Honor has put it, is interference with the ability of the attorney to communicate with his client, the burden was on the attorney.

THE COURT: Let me ask you this.

MR. RENICK: Yes.

[p. 38] THE COURT: Has this procedure ever been followed in the past in the history of Los Angeles County?

MR. RENICK: I believe so. I believe Mr. Oppenheim had done it before. But I don't - I can't give you chapter and verse.

THE COURT: I mean where you have got - where you've got a client going in the Grand Jury room, and you've got the lawyer there, and you have got a search warrant, and you have got a Special Master there and all the rests, has that ever happened before?

MR. RENICK: I don't know, your Honor. I wouldn't want to -

JUDGE 2: Mr. Renick, don't you think the public officer has a duty to uphold certain standards and certain ethics? And if the people on the other side don't have that, whatever criminals and so on, you think the public office ought to engage in the same kind of activity to out maneuver them?

MR. RENICK: I'm not going to hold what happened up and say this is the way we want people to act.

JUDGE 2: Tell us a procedure before the Supreme Court where the Solicitor General gets up and

confesses error where the government has taken [p. 39] advantage of somebody?

MR. RENICK: I think that's a very noble and is the way we should -

JUDGE 2: It's not noble. It's actually - it's what the Constitution requires. It's a document of prohibition to prohibit the government from over reaching the people.

MR. RENICK: I agree.

JUDGE 2: Don't tell me it's okay because you want to make somebody nervous. You want to take advantage of them. Is that what it's about? It's not a game. I mean, you have all the tools.

MR. RENICK: Yes, but -

JUDGE 2: You don't have to use them all.

MR. RENICK: I agree, your Honor. But we are here asking not whether or not this smells, but whether or not it violated the Constitution.

JUDGE 2: What do you think that's doing when you don't let somebody talk to their lawyer?

MR. RENICK: We didn't -

JUDGE 2: You know they are nervous. You know that they are upset and are asking to go out and talk to somebody, and you are preventing that from happening.

MR. RENICK: I must disagree. We did not [p. 40] prevent it. Sir, the most that can be said about what the District Attorney -

THE COURT: Isn't that a factual issue?

MR. RENICK: No.

THE COURT: Why not?

MR. RENICK: Because we take the facts as Mr. Gabbert himself has laid them out. The undisputed plaintiff's version -

THE COURT: No reasonable jury could come to the conclusion that Mr. Gabbert's client was in any way prevented from consulting with her attorney. Is that what you are saying? That has to be what you are saying.

MR. RENICK: No. What I'm saying is: If it came down to it that given the facts stated by the plaintiff, you cannot say that the District Attorneys made it impossible for her to communicate with her attorney. At best you can say they put them in a mood where they might not have -

THE COURT: But you just told us earlier that that was part of their plan.

MR. RENICK: I'm saying we can assume. Let us assume that.

THE COURT: That's why they (inaudible) -

MR. RENICK: No, not - not - I certainly - [p. 41] if I did, I apologize. I never said that their purpose presumptively was to prevent communication. If anything, it would have been Ms. Baker's being questioned to reveal information that she's reluctant to reveal.

THE COURT: (Inaudible) to disrupt communication? Interfere with communication?

MR. RENICK: I don't think there was any plan. And the facts do not show that there was any attempt to prevent any sort of communication.

THE COURT: Why was it done - why was it done that way, the way it was done?

MR. RENICK: If -

JUDGE 2: It wasn't a plan when they served the search warrant on Gabbert and then milliseconds later order his client in the Grand Jury room? That's not a plan?

MR. RENICK: I'm not saying that's not a plan. The question is: Was the plan to interfere with the ability of the two to communicate or to do something else?

THE COURT: Let me ask you this. In order to state a cause of action, must the plaintiffs prove that that was the subjective intent of these D.A.s and police officers, or must they only prove that it was [p. 42] the practical consequence of doing so?

MR. RENICK: I don't have an immediate answer. But let us assume it's only to show the practical consequences. Again, that is not, in fact, what happened.

What the District Attorneys did here at most was have Mr. Gabbert served with a search warrant in front of his client where he was still accessible. Mr. Gabbert moved himself out of convenience location to his client. Mr. Gabbert refused an opportunity to speak with his client. Those were not things -

JUDGE 2: Would you have stood there if you were Mr. Gabbert to have yourself searched in front of your client?

MR. RENICK: If I believed that my client was so nervous that she needed me there, yes, I would have stripped down to my Skivvies.

JUDGE 2: How could you have talked while they were searching you?

MR. RENICK: I would have asked the nice 80-year-old gentleman to step aside for a moment and let me talk to my client.

JUDGE 2: You think he would have done that?

MR. RENICK: Absolutely.

THE COURT: The Special Master who volunteers [p. 43] to do this kind of work but quite obviously has probably never read the statute?

MR. RENICK: Again, I have to disagree, your Honor, with the characterization that the statute was completely violated. Mr. MacLatchie -

THE COURT: I didn't mean to suggest that every line and text of it was. But, you know, we all know the background history to the adoption of statutes like this in California and other states. And there was reason concern about the use of search warrants to get at privileged information and to impair the attorney-client relationship. That's why we have a Special Master, I assume. That's why the California legislature provided that only the Special Master can search, and no further search may

take place without the object's consent. And clearly both of those were violated.

MR. RENICK: I disagree as to "both of those."

THE COURT: Okay. Which one was not?

MR. RENICK: Both. I believe both were not violated.

As to the first, the statute is very clear that the only objection the target may make to the Special Master is the Special Master's seizure and ultimate disclosure of items. It's Section C, [p. 44] sub 20 -

THE COURT: Let's look at the statute.

"Upon service of the warrant, the Special Master shall inform the party served of the specific items being sought, and that party shall have the opportunity to provide the items requested." Was that done?

MR. RENICK: I believe so, your Honor.

THE COURT: Was Gabbert given an opportunity to produce it?

MR. RENICK: I believe that was the circumstances under which he turned over the two photocopied pages.

THE COURT: "If the party who has been served states that an item or items should not be disclosed, they shall be sealed by the Special Master and taken to the Court for hearing." Did that happen?

MR. RENICK: As far as I'm aware, your Honor, it didn't because it wasn't necessary for it to happen.

THE COURT: Okay.

MR. RENICK: And if -

[p. 45] THE COURT: "The party or his or her designee" - that's, in this case, the County, the police officers and the D.A.s - "shall not participate in the search, nor shall he or she examine any of the items being searched by the Special Master except upon the agreement of the party upon whom the warrant has been served." In this case, that's Gabbert.

That was violated, wasn't it?

MR. RENICK: I disagree, your Honor.

THE COURT: Well, tell me how.

MR. RENICK: Okay. As far as the last one - this is on Page 359 of Volume 2 of the excerpts of records.

The initial search had been completed. They had returned to the empty room. Mr. Gabbert states, "At some point shortly thereafter, Conn comes up. He says, Mr. Oppenheim or the Special Master" -

THE COURT: I can't hear you.

MR. RENICK: I'm sorry.

"At some point shortly thereafter, Conn comes up. He [p. 46] says, Mr. Oppenheim or the Special Master - I forget how he referred to him - has determined that none of the items in your briefcase are privilege; therefore, Detective Zoeller is going to search your briefcase as directed by the judge who issued the search warrant.

"I protested. I asked that it be delayed so that my counsel could appear. I said that if he made a determination that there was nothing privileged in my briefcase, he was correct or in error.

"I - I started" -

THE COURT: I'm waiting for the word "consent." Are we going to hear the -

MR. RENICK: "I started - I started to repeat the procedure that I'd gone through with Oppenheim, and I pulled out the two other files behind - besides Ms. Baker's, and the one file that contained" - (End of Tape 1, Side 1; beginning of Tape 1, Side 2.)

[p. 47] MR. RENICK: - viewed as consent.

Now, whether or not in, you know, quiet hindsight, you know, calm reflection it should have been taken that way, that's a whole nother matter. But Mr. Gabbert was acting in a manner that at least was, you know, conceivably consent.

I'm not going to say that he was, you know, sitting back there and saying, "Oh, sure." But, you know, he also didn't say -

THE COURT: I have a hunch you're going to get a chance to retry this case. And if you want to argue that if front of the jury, be my guest.

MR. RENICK: But, your Honor, if I may -

THE COURT: It will be a disservice to your client if you do. I promise you.

MR. RENICK: Well, I'm left with the factual problems. I'm going to have to feel the best I can.

THE COURT: You're getting paid by the hour.

MR. RENICK: Your Honor, in terms of what you've just said about we're going to get a chance to retry it -

THE COURT: That's just my view. We haven't conferred on this. I think you're going to get a chance to retry it though.

MR. RENICK: The reason why -

[p. 48] THE COURT: Try it on the merits.

MR. RENICK: Well, the concern - not the concern - the comment that I'd make is - even if this court comes to the conclusion that what happened was reprehensible, that it was completely below any standard that we would want of our prosecutors, of our police, of Special Masters, of any of that - the question here is: Do we have a constitutional violation that entitles Mr. Gabbert to proceed on a federal cause of action.

Let us assume that Section 1524 has been, as your Honor said, violated from the get-go, has been - nobody has follow it. There has been an attempt, you know, to get around it. That is at best, if it exists at all, a state law cause of action.

The question of interference between the client and the attorney might create a federal cause of action. But I have to say on the behalf of my two clients, if that happened, and if the court determines that, in fact, that's what they did, they are absolutely immune for that.

They were doing it in the context of their running a grand jury prosecution – grand jury investigation and an ongoing retrial of, as your Honor put it, a highly publicized case.

[p. 49] If we permit –

JUDGE 3: But isn't there an element of good faith in immunity?

MR. RENICK: No.

JUDGE 3: There is not?

MR. RENICK: No. The cases that have dealt with that deal with – there are cases that deal with attorneys in grand jury proceedings who have brought about false testimony and essentially warped the entire grand jury process, which is far from what we have here. And they have been held to be absolutely immune.

There is a court from Judge Goodwin in our brief that talks about the sort of can of worms that you open if you allow attacks on the manner in which prosecutors do their jobs. Which is what the argument – that this was orchestrated, that this was an attempt to interfere with their ability to communicate, that's where we're talking about.

We are saying they didn't prosecute in a manner that we like. Well, any defense attorney –

THE COURT: That's not the allegation in this Complaint. The allegation in this Complaint is that these people acting in concert deliberately disrespected a clear and established constitutional [p. 50] right of Mr. Gabbert, and did so for the purpose of gaining unwarranted

vantage in a serious criminal investigation. That's the allegation.

MR. RENICK: If that's the allegation, that's –

THE COURT: That's an allegation because we're dealing with an appeal from a Motion to Dismiss that we must assume to be true.

MR. RENICK: If your Honor assumes it, the absolute immunity still applies. They were doing it, if they did it, in the context of their jobs as prosecutors, and we might not be happy with their choice to do that. But once we open the door and say you can start questioning any action, however vile we might find it to be, how do we say this vile and no viler?

We're asking that almost any defense attorney be able to say, "Somehow you have interfered with me. I didn't get the Discovery soon enough. I didn't get a chance to interview that witness, you know, at the timing that I wanted. My client was" –

JUDGE 2: That isn't this case.

MR. RENICK: I agree. It's not this case. But that's the matter – that's the situation with absolute immunities. You have to – they have to cover [p. 51] everything.

JUDGE 2: This is basically a case where you have got a client, defense counsel, and you've got the government right in the middle –

MR. RENICK: Well –

JUDGE 2: – blocking. That's this case.

MR. RENICK: Again, I disagree factually that, in fact, they blocked anything. But if the Court isn't going to believe that, then, yes, indeed, that's the situation. But then the absolute immunity as to my two clients should apply.

JUDGE 2: What's the client supposed to think when the client is on the way to the Grand Jury, and the client's lawyer is served with a search warrant and is then isolated from the client?

MR. RENICK: Well, she was going to be isolated from him by the very nature of grand jury proceedings.

JUDGE 2: Sure. But when she walks in, here's her guardian, her counselor, who is sort of reduced to a pretty low status.

MR. RENICK: Maybe that's the exact purpose. That the whole purpose of having her come to testify is to encourage her to reveal the information that they are looking for.

THE COURT: To encourage her to incriminate [p. 52] herself?

MR. RENICK: I honestly don't think that the D.A.s really had much of an interest in Ms. Baker as a criminal target. They wanted -

THE COURT: They told her she was the target of a perjury investigation.

MR. RENICK: Again - and what was - if we think like a prosecutor, what is more likely to make a person -

THE COURT: I used to be a prosecutor. I know.

MR. RENICK: I'm aware, your honor.

THE COURT: I know how to think like one.

MR. RENICK: I apologize.

THE COURT: I would have fired an assistant that did anything like this summarily.

MR. RENICK: Your Honor, I can't question how you would approach this. You were not only a prosecutor, you were in a supervisory position. And if that's the way, you know, you ran your office, I think that's great because that's what I would agree we'd want out of people. But the reality is that in an adversarial system, which to at least a certain extent the criminal is, you do try and take advantage. Not beyond a line that is prohibited.

[p. 53] JUDGE 2: -How about unfair advantage?

MR. RENICK: What is unfair?

THE COURT: I have a feeling we're going to find out.

JUDGE 2: (Inaudible) something there is no reason to. You have all the equipment that you need. You have the police. You have investigators. You have everything at your disposal. Your opponents don't have that.

It doesn't take very much for you to go get a subpoena. It doesn't take very much for you to ask questions. It doesn't take very much for you to have a grand jury where people can't do really very much. They can't assert - unless they assert their rights, and even then you can

take them before a judge. So you strip people practically naked of their rights. You don't have to go any further than that. You have everything going for you.

MR. RENICK: Your Honor, if I agree, that still doesn't change my position. Because then what you're saying - what Judge Hawkins has said is -

JUDGE 2: (Inaudible) all I'm asking you to do.

MR. RENICK: No, but -

JUDGE 2: All I'm asking you to do is what we ask everybody else to do who are lawyers, and who are [p. 54] in law enforce, just do the right thing.

THE COURT: Play by the rules.

JUDGE 3: Set an example.

JUDGE 2: So that's what the rules are.

MR. RENICK: I agree. But that's not our issue here. With all due respect, the solution is to fire them -

JUDGE 3: Well, we wouldn't -

MR. RENICK: - to discipline -

JUDGE 3: We wouldn't - we wouldn't be here if you followed the rules, would we?

JUDGE 2: This would have been over a long time ago.

JUDGE 3: We wouldn't be here.

MR. RENICK: Well, your Honor, with all due respect, we have seen any number of cases that have no business being in the court system, much less having come to appeals.

JUDGE 3: We can't say that about this one.

MR. RENICK: I - I'm beating a dead horse, so I would just - just finish with -

THE COURT: Your red light is also on.

JUDGE 3: Your red light is on.

MR. RENICK: Thank you very much, your Honor.

JUDGE 2: Thank you.

[p. 55] JUDGE 3: We've given you 16 minutes and 50 seconds over.

MR. RENICK: I appreciate it. Thank you very much.

MR. LIGHTFOOT: One comment, Judge Hawkins.

THE COURT: Mr. Lightfoot, don't you do anything to spoil it.

MR. LIGHTFOOT: No, I - a fuller answer to your first question out of the box. Mr. Gabbert was trying his best he could to resist during the time he's being searched. The search of two independent files - as your honor has alluded to - the interview notes of his interview with Ms. Baker, private information about people close to him.

In the Complaint, it indicates that during the course of this time Mr. Oppenheim was trying to copy these materials, and he was resisting that all during this period.

Thank you very much, your Honors.

THE COURT: Matter will stand submitted. And next matter *Smith vs. Oakland Scavenger*.

(End of recording on Tape 1, Side 2)

* * *

[p. 59]

STATE OF CALIFORNIA

COUNTY OF LOS
ANGELES

ss.

I, DEBRA L. VENTURA, Certified Shorthand Reporter No. 9860, and Deposition Officer for the State of California, do hereby certify;

That the foregoing 55 pages comprise a true and correct account of the audio portion of the subject audiotaped proceeding that was conducted in English, as transcribed by me and reduced to typewriting under my direction and supervision, except in the instances where the transcript indicates "Inaudible."

I hereby certify that I am not interested in the event of the action.

IN WITNESS WHEREOF, I have subscribed my name this 1st day of December, 1998.

/s/ Debra L. Ventura
Certified Shorthand Reporter
in and for the County of Los
Angeles, State of California

APPENDIX C

MANUAL ON GRAND JURY PRACTICE & PROCEDURES

[LOGO]

LOS ANGELES COUNTY
DISTRICT ATTORNEY'S OFFICE
GIL GARCETTI
DISTRICT ATTORNEY

July - 1993

* * *

Section 9

APPEARANCE OF GRAND JURY SUBJECT

The decision whether to invite or subpoena the subject of a Grand Jury inquiry is one which must be made by the prosecutor presenting the case. A suggested letter of invitation is included in Appendix C.

If subpoenaed, the subject of a Grand Jury inquiry must appear and be sworn. *People v. Conway*, (1974) 42 Cal.App.3d 875; *In re Lemon* (1936) 15 Cal.App.2d 82. However, after being called before the Grand Jury, the subject may assert the privilege against self-incrimination. *Counselman v. Hitchcock* (1892) 142 U.S. 547; *In re Lemon, supra*. If the prosecutor knows that the subject of the inquiry is represented by counsel, defense counsel

should be notified in advance that his or her client has been subpoenaed and will be required to appear before the Grand Jury. Counsel may not be present at the hearing; however, the subject may be excused to consult with counsel as needed before answering questions posed to him or her.

The question of whether and to what extent an admonition should be given to the subject of a Grand Jury inquiry will have to be determined by the prosecutor presenting the case, in consultation with the Grand Jury Advisor.

If a person who is the subject of the Grand Jury hearing invokes his right against self-incrimination, the prosecutor presenting the case should remind the Grand Jury that such assertion should not be considered and is not a basis for the conclusion that the subject must be guilty of a crime or for the return of an indictment.

Section 10

PREPARATION OF "GRAND JURY PACKET"

As directed by the Grand Jury Advisor, the prosecutor shall prepare and deliver to the Grand Jury Advisor a Grand Jury Packet, which includes:

- A. a Foreperson's Statement (see Section 16, and APPENDIX D)
- B. a tentative witness list,
- C. an exhibit list (see Section 18, and APPENDIX E)

- D. substantive jury instructions applicable to the charges sought (see Section 28, and APPENDICES F and G), and —
- E. an outline of the proposed indictment (see APPENDIX H), and

* * *

[TO BE ISSUED ON DISTRICT ATTORNEY LETTERHEAD]

(DATE)

(NAME)

(ADDRESS)

(CITY, STATE, ZIP)

Dear _____:

On [DATE] , the Los Angeles County Grand Jury will be conducting an investigation into a criminal matter in which you may be involved. The matter under investigation relates to [BRIEF DESCRIPTION] .

On behalf of the District Attorney's Office, I am extending an invitation to you to appear and testify before the Grand Jury in regard to this matter. The letter you are now reading is a letter of invitation only. This is not a subpoena. You are not under any obligation to accept this invitation or to respond to this letter in any way. This invitation is being extended to you so that you will have an opportunity, if you so desire, to offer to the Grand Jury any information which you might have regarding the matter under investigation. You are not being ordered,

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compelled, or advised to accept this invitation to appear and testify.

In the event that you decide to accept this invitation and want to testify before the Grand Jury, you may do so by contacting me before [DATE], preferably by telephone, at [NUMBER], or by letter directed to me at the address noted on this letterhead. I can then arrange an exact time for your appearance before the Grand Jury.

Sincerely,
GIL GARCETTI
District Attorney

By

Deputy District Attorney

D-1

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,

Plaintiff

-vs-

DAVID CONN, CAROL NAJERA,
ELLIOT OPPENHEIM, LESLIE
ZOELLER, and DOES 1 THROUGH
X, inclusive,

Defendants.

No. 94 4227
(RSWL) (ex)

DEPOSITION OF TRACI L. BAKER, taken on behalf of Defendants, at 500 North Temple Street, Suite 648, Los Angeles, California, at 2:30 p.m., Thursday, May 4, 1995, before JENNIE A. ARNOLD, CSR No. 4182, pursuant to Notice.

Reported by: JENNIE A. ARNOLD, CSR No. 4182

Job No. 95-0504JAA

APPEARANCES

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* * *

[p. 20] BY MR. BRAZILE:

Q Do you know where he currently works?

A No.

MS. PODBERESKY: Objection. Relevance.

BY MR. BRAZILE:

Q Do you know what city he resides in at this time?

MS. PODBERESKY: Objection. Relevance.
Asked and answered.

THE WITNESS: No.

BY MR. BRAZILE:

Q Do you know what city he works in?

A No.

MS. PODBERESKY: Objection. Relevance.

BY MR. BRAZILE:

Q Do you know the name of anyone who would
know his whereabouts?

MS. PODBERESKY: Objection. Relevance.

THE WITNESS: At this moment, I do not.

BY MR. BRAZILE:

Q When the search occurred at your residence on or
about March 18, 1994, what time did it occur?

MS. PODBERESKY: Objection. Relevance.

THE WITNESS: I would estimate between the
hours of 6:45 - are you talking about the beginning of
when they first arrived at my home?

[p. 21] BY MR. BRAZILE:

Q Exactly.

A Between 6:30 and 7:30.

Q A.M. or P.M.?

A P.M.

Q Who arrived?

MS. PODBERESKY: Objection. Relevance and lack of foundation, if you know these people.

May I have a moment with my client?

(The witness and her counsel confer out of the hearing of the reporter.)

THE WITNESS: District Attorney Conn, District Attorney Najera, Detective Zoeller, and the fourth person, I know, was a representative of the Beverly Hills Police Department, but I don't know his name.

BY MR. BRAZILE:

Q When they came to the residence, did they serve you with a search warrant?

MS. PODBERESKY: Objection. Relevance.

THE WITNESS: Yes, they did.

BY MR. BRAZILE:

Q Do you recall what was requested in the search warrant, what they were looking for?

MS. PODBERESKY: Objection. Relevance.

[p. 22] THE WITNESS: I believe it was something to the effect of correspondence and/or legal - I don't recall exactly.

BY MR. BRAZILE:

Q Do you recall if the search warrant asked for correspondence between you and Lyle Menendez?

MS. PODBERESKY: Objection. Relevance.

THE WITNESS: I don't recall, specifically.

BY MR. BRAZILE:

Q Do you recall anything that they were looking for, pursuant to the search warrant, on or about or when they actually came out to serve the warrant?

MS. PODBERESKY: Objection. Relevance.

THE WITNESS: I know they were searching for things related to Lyle Menendez. I don't know specifically what they were looking for.

BY MR. BRAZILE:

Q Was this a house or an apartment?

A An apartment.

Q When they came to your apartment to execute the search, did you have anything at all belonging to Lyle Menendez in your house?

MS. PODBERESKY: Objection, and advise my client not to answer that question under the Fourth, Fifth and Sixth Amendment rights, the attorney-client privilege and under the appropriate Business and Professions Code and the [p. 23] Disciplinary Rules of the State Bar.

BY MR. BRAZILE:

Q Prior to March 18, 1994, had you given any correspondence between you and Lyle Menendez to your attorney, Mr. Paul Gabbert?

MS. PODBERESKY: I am advising my client not to answer that question under the Fifth Amendment, the Sixth Amendment, the attorney-client privilege and the appropriate Business and Professions Code.

BY MR. BRAZILE:

Q During the search of your home, was anything taken?

MS. PODBERESKY: I am advising my client not to answer that question under the Fourth Amendment.

BY MR. BRAZILE:

Q Do you even know if anything was taken from your home?

MS. PODBERESKY: Go ahead. You can answer.

THE WITNESS: I do know if things were taken from my home.

BY MR. BRAZILE:

Q What was taken from your home?

(The witness's counsel conferred with Plaintiff out of the hearing of the reporter.)

[p. 24] MS. PODBERESKY: I am going to object, Fourth and Fifth Amendments, but I will instruct my client to answer the question.

THE WITNESS: Photographs, magazines, newspapers. I don't recall the other items.

BY MR. BRAZILE:

Q Anything else?

A Letters to Lyle from well-wishers.

Q The letters to Lyle from well-wishers, how did you come into possession of those?

MS. PODBERESKY: Objection. I am instructing my client to assert her Fifth Amendment right and not to answer that question.

BY MR. BRAZILE:

Q How many letters from well-wishers to Lyle did you have in your house on March 18, 1994?

MS. PODBERESKY: Same objection.

BY MR. BRAZILE:

Q The photographs that were taken from your home, did any of those photographs depict either you or Lyle Menendez?

MS. PODBERESKY: Same objection.

BY MR. BRAZILE:

Q On March 18, 1994, did you have any photographs in your possession of Lyle Menendez?

[p. 25] MS. PODBERESKY: Same objection.

MR. BRAZILE: What's the objection, Counsel, so the record is clear?

MS. PODBERESKY: I'm instructing my client to assert her Fifth Amendment right, and I am also instructing my client not to answer pursuant to the Fourth Amendment.

BY MR. BRAZILE:

Q How long did the search last on March 18, 1994?

MS. PODBERESKY: Objection. Relevance. But she may answer.

THE WITNESS: Approximately an hour and 15 minutes to an hour and 45 minutes.

BY MR. BRAZILE:

Q Was your boyfriend present during the entire time of that search?

A He was inside the residence, although he wasn't present all the time in front of the people doing the search.

Q Does your boyfriend know Lyle Menendez?

MS. PODBERESKY: Objection. Relevance.

THE WITNESS: May I have a moment?

(The witness confers with her counsel and the Plaintiff out of the hearing of the reporter.)

MS. PODBERESKY: We're going to need clarification of your question. My client doesn't understand it. Could you

* * *

[p. 28] Menendez?

MS. PODBERESKY: Same objection.

BY MR. BRAZILE:

Q To the best of your knowledge, do you know whether or not Justin Frye has ever had any conversations with Lyle Menendez?

MS. PODBERESKY: Same objection.

BY MR. BRAZILE:

Q During the search of your home, did anyone ask you any questions?

A Yes.

Q Who?

A Mr. Conn.

Q What did he ask you?

MS. PODBERESKY: Objection.

MR. GABBERT: Let her answer.

MS. PODBERESKY: I withdraw the objection.

THE WITNESS: He asked me how I was referred to my counsel.

BY MR. BRAZILE:

Q Did you answer that question?

(The witness's counsel and the Plaintiff confer out of the hearing of the reporter.)

MS. PODBERESKY: Could you repeat the question?

* * *

[p. 32] BY MR. BRAZILE:

Q Prior to the search occurring on your home on March 18th, 1994, did you know there was going to be a search prior to it occurring?

A No.

Q So the first time that you knew there was going to be a search of your home was when they showed up at your home to execute the search; correct?

A Yes.

May I have one moment?

(The witness confers with her counsel out of the hearing of the reporter.)

MS. PODBERESKY: I need to take a recess and speak to Mr. Gabbert and my client.

(A short recess was taken.)

MS. PODBERESKY: Going back on the record.

Miss Baker has to clarify one of her answers to a previous question.

THE WITNESS: I'm a little nervous, and I wasn't thinking. Mr. Zoeller - and I don't know the time frame - came to my home with another person - I think it was a female - at about 8:00 in the morning, two to three weeks prior to the search, maybe. That's an estimate. I don't recall exactly.

[p. 33] BY MR. BRAZILE:

Q What happened when he came to your home on that occasion?

(The witness confers with her counsel out of the hearing of the reporter.)

THE WITNESS: He did not tell me the purpose of his visit. He attempted to question me.

BY MR. BRAZILE:

Q What did he ask you?

A I don't specifically recall. I believe it was questions regarding whether or not I knew the Menendezes.

Q What did you say?

MS. PODBERESKY: Objection. I advise my client not to answer under the Fifth Amendment.

MR. BRAZILE: And the Sixth Amendment?

MS. PODBERESKY: Sure. And the Sixth Amendment.

MR. GABBERT: The record should reflect I am still the attorney of record for Miss Baker in the grand jury investigation for which she was a target for perjury investigation which, to my knowledge, is still pending, and the Statute of Limitations has not run.

THE WITNESS: Mr. Zoeller asked me -

MS. PODBERESKY: I'm instructing - is there another question, or did I miss it?

* * *

APPENDIX E
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,)	
)	
Plaintiff,)	
)	
vs.	)	No. CV 94 4227
	)	RSWL(Ex)
DAVID CONN, CAROL NAJERA,)	
ELLIOT OPPENHEIM, LESLIE)	
ZOELLER AND DOES 1)	
THROUGH X,)	
)	
Defendants.)	
)	

DEPOSITION OF DAVID P. CONN, taken on behalf of the Plaintiff, at 655 South Hope Street, Los Angeles, California 90017, commencing at 11:20 A.M., Friday, August 4, 1995, pursuant to Notice, before Joanne Hokyo, CSR #9169.

APPEARANCES:

FOR PLAINTIFF PAUL L. GABBERT:

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 WOEHRLE & SADOWSKY

BY: MICHAEL J. LIGHTFOOT

And

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* * *

[p. 36] Q All right. At least in Federal Court, "target" is used to describe a person who the prosecutor is trying to determine whether to prosecute for a crime?

A Uh-huh.

Q If that's the definition of "target," was Traci Baker such a target after January, '94?

A Traci Baker was a potential witness but a potential suspect as well.

Q For perjury?

A Right.

Q In the Menendez trial?

A Right.

Q And you become aware at some time - would it have been in February - that she was represented by Paul Gabbert?

MR. BRAZILE: Objection. Vague.

BY MR. LIGHTFOOT:

Q You can answer that.

MR. BRAZILE: If you know if she was represented. I mean, if you have some specific knowledge, but don't guess or speculate. If you don't know, tell him you don't know whether or not she was represented and for what.

THE WITNESS: At some point in connection with the proceedings, we did become aware that she was represented by Gabbert.

* * *

[p. 40] Q It says at the bottom on page 7 - it says it was executed in Los Angeles.

I don't even know. Is Beverly Hills part of Los Angeles?

MR. BRAZILE: It's part of Los Angeles County.

BY MR. LIGHTFOOT:

Q Does that help?

A No. That would only mean that he signed it in Los Angeles.

Q Do you recall him signing it Downtown in your offices?

A I don't think I was present when he signed this. I don't recall being present.

Q Did you have conversations either in February or March with Gabbert about your investigation of his client Traci Baker?

A Right. I did speak to him on the phone.

Q She was served with a Subpoena on March the 17th, Thursday.

Do you remember how many conversations you had with Gabbert about his client before March the 17th?

A No. I don't recall.

Q Do you recall the nature of the conversations?

A All I can say is, I do recall a couple of [p. 41] telephone calls with him in which there was some discussion concerning her cooperation and whether there could potentially be immunity in this case. But I can't say how many phone calls there were.

Q Do you have notes of any of those conversations?

A No. I don't.

Q And when you say "cooperation," were you talking to him about having her cooperate against Lyle Menendez?

A If she would testify truthfully against Eric and Lyle Menendez.

Q So you would bring subornation of perjury charges against them, and she would be a witness for you?

A If that's what the evidence would support, then that was a possibility.

Q And then I gather, at least before this subpoena was served, that you had not reached any agreement with Gabbert about that?

A Correct.

Q Do you have any knowledge whether Zoeller had met with Traci Baker before she was served with a Subpoena on the 17th of March?

A I don't recall what his contact with her consisted of at this time.

. . .

[p. 45] Baker's house?

A Yes.

Q Do you want a little time just to look - you're looking at the probable cause affidavit on the March 18th warrant?

A Right.

Q Why don't you take a minute and read that.

A (Witness complies.)

(Whereupon a discussion was held off the record.)
BY MR. LIGHTFOOT:

Q Have you had an opportunity to read the probable cause affidavit on the March 18 application for the application of the search warrant?

A Yes.

Q Do you have any better recollection now as to how many conversations you had with Mr. Gabbert on

the 18th about his trying to get a continuance of the Grand Jury appearance?

A No. I don't recall.

Q Is it fair to say he was asking for a continuance because he wanted to file a motion in Superior Court to quash the Subpoena because it would compel his client to incriminate herself?

A I forget the reasons he was giving me. I [p. 46] know he wanted to delay. And I told him I wasn't going to delay the proceedings.

Q But do you recall that he told you that he was asking for a continuance because he wanted an opportunity to make a motion to convince the Judge that you were seeking correspondence and that production would be testimonial in nature and run afoul of her 5th Amendment privilege?

A Right.

Q And you did not agree to that continuance?

A Correct.

Q And at the end of the one or more conversations you had with him, was it understood between you and him that the 8:30 A.M. Grand Jury appearance was still in effect?

A Correct.

Q And then it was your decision then to obtain a search warrant for Traci Baker's home?

A Correct.

Q And I gather Zoeller put the affidavit together outside of your presence?

A From what I recall, yes.

Q At some point he got information from you because the last few pages contain information that was in your particular knowledge and not his; is that not [p. 47] correct?

A Correct.

Q Do you recall that conversation today or conversations with Zoeller?

A No. I don't recall it specifically. I know that at some point, I guess I gave it to him or the secretary who typed it up. I don't recall having the conversation itself.

Q The warrant itself indicates that it was issued by Judge Pounders at - this is like the second - the search warrant, the second page of the search warrant - 4:36.

A Uh-huh.

Q Do you have a recollection of having a conversation with Judge Pounders either in person or on the phone about this matter?

A No. I don't.

Q Are you sure you did not have such a conversation?

A I'm sure I did not.

Q Did you then meet with Zoeller some time after the warrant was obtained at 4:36?

A Yes.

Q Did you accompany him down to Orange County to execute the search warrant?

* * *

[p. 78] with Gabbert in your office; is that right?

A Right. So I think that either I saw him - well, I could have seen him at any time that morning. I just don't know. I think definitely by the time Gabbert had left, either I saw him then, or I had seen him earlier that morning.

Q Right.

Were you aware before you got to work that morning that there's a procedure when you search a lawyer or his office that you employ a special master?

A Correct.

Q You knew that before you got to work that morning?

A Correct.

Q Did you at some point decide to use a special master in this case?

A Correct.

Q Did you make that decision to use a special master before you sat down with Mr. Gabbert in your office that morning?

A I don't know if it was before or after. But at some point I realized that we should use a special master.

Q Had you ever used a special master before in executing a search warrant on a lawyer's office or [p. 79] person?

A No.

Q Were you aware of how the procedure operated that morning?

A What do you mean "how the procedure operated"?

Q How you go about getting a special master and what the role of a special master is in the execution of the warrant.

A You just contact someone on the list and find out who's available.

Q Okay.

Were you indicating earlier that if, in fact, you had been able to work out this proffer arrangement, immunity proffer with Mr. Gabbert, you'd have to get approval for the grant of immunity; is that correct?

A Yes.

Q And who, that morning, would you have been required to obtain an approval from in order to get a grant of immunity?

A Officially, it would probably be from an Assistant - one of the Assistant District Attorneys.

Q Have you done that before?

A Yes.

[p. 80] Q And is that how you did it? You went to an Assistant District Attorney?

A Yes.

Q To get immunity, you have to go to a Court and have a Court confer immunity in writing, do you not?

A Ordinarily, that's the best way to do it.

Q And in this instance, you would have gone to Department 100 to get that grant of immunity? That could have been worked out?

A Correct.

Q would you get the approval from the Assistant District Attorney in writing?

A Not necessarily.

Q With respect to the use of a special master, are there any written rules or documents in the D.A.'s office which indicate the procedure to be sued by the District Attorney who's employing the procedure?

A I'm sorry. Can you repeat that.

Q Are there written documents, either rules, regulations or guidelines -

A Right.

Q - that were in existence in the District Attorney's office at that time in March of '94 that the individual department D.A.s would use to determine what procedures to follow?

[p. 81] A Yes. There were.

Q And did you avail yourself of those documents?

A Not that morning. There was no reason to. I'm familiar with the procedure in my office. And I'm familiar with the document. So there was no reason to refer to the documents that morning.

Q When's the last time before March 21, 1994 that you had employed a special master to execute a search warrant of a lawyer's office or person?

A No. I don't know that I have, not personally. I don't know that I have.

Q How was it that you were aware of the procedures on March the 21st if you hadn't done it before?

A Well, I simply knew, whether from the source materials in my office or from word of mouth, that there is a list of special masters and that when we need one, we go to the list and find out who is available and bring them in.

Q You never had occasion, though, to use the list before to look at the list before?

A I seem to recall using a special master in one other case. I'm not sure exactly when that case was though.

Q Do you recall there being a prior occasion [p. 82] when you looked at a list of special masters?

A I don't recall ever looking at a list of special masters myself. Normally, I would just tell my secretary

or someone else to take a look at the list and see who's available.

Q On this occasion, did you, yourself, look at a list?

A No. I don't think I looked at the list.

Q What did you do?

A Probably the secretary, probably Patty looked at the list and made some calls.

Q Do you recall today that you did not look at a list?

A I simply have no recollection of looking at a list. It's possible I looked at the list. I just have no recollection.

Q Was Ms. Najera involved in this effort by you to obtain a search warrant?

A Yes. She was involved in this.

Q She testified yesterday that she had a recollection of looking at a list of individuals.

Does that refresh your recollection?

MR. BRAZILE: Well, Counsel, I don't believe that was her testimony. Unless you have a transcript of it, that's not the way I recall it. So why don't you rephrase [p. 83] the question.

BY MR. LIGHTFOOT:

Q My recollection, Mr. Conn, which could be imprecise, is that Ms. Najera testified yesterday that she did look at a list of individuals who she understood to be a list of special masters that had been provided by the State Bar.

My having said that, does that refresh your recollection as to whether or not you looked at such a list?

A No. It doesn't. Again, she might have looked at it, and Patty might have looked at it, but I don't recall if I did or not.

MR. LIGHTFOOT: That's marked as something.

MS. WIDDIFIELD: Yes. That's marked as Exhibit 1 in the Oppenheim deposition.

BY MR. LIGHTFOOT:

Q This is a document that we received in discovery from your office, Mr. Conn. And it's -

MR. BRAZILE: County Counsel's office.

MR. LIGHTFOOT: I apologize. County Counsel's office.

Q The top page, though, is a memo from Sandra Buttita to Assistant District Attorneys. It's dated June 6, 1994. It's dated a couple months after the incident [p. 84] we're talking about. But it contains a 1, 2, 3, 4, 5, 6, 7, 8 multi-page list of special masters in Los Angeles County.

I'm just going to hand it to you and ask you, does that refresh your recollection as to whether you've seen a list, and is that the list?

A There's no way I could say if it's -

MR. BRAZILE: Let me just go through it. And we'll go through it together.

THE WITNESS: There is no way that I can say if this was the same list that they had at the time or not because, as I said, I don't really recall looking at a list.

BY MR. LIGHTFOOT:

Q So you have no recollection of seeing any list, this one or any other?

A Right.

Q Do you recall at some point that you learned that Elliot Oppenheim would be the special master?

A Well, yes. At some point I heard his name.

Q How did you learn that?

A I don't recall.

Q Did you make the selection of Elliot Oppenheim?

A No. I don't think that I was the one [p. 85] who - I'm not sure who selected him. I'm not sure I was the person.

Q Who do you recall making that selection?

A I don't recall how the process was. I don't recall who made the selection. I just know that somehow we got a hold of a special master.

Q And that morning as the process was ongoing, did you know Elliot Oppenheim?

MR. BRAZILE: Personally or had he ever met him before?

BY MR. LIGHTFOOT:

Q Ever hear the name? Ever met him?

A Yes. I had seen him before.

Q Where had you seen him before?

A I don't know. I don't know where I've seen him before. Whether it was in court or somewhere else, I don't know. But I think I have seen him before.

Q Did you recognize the name Elliot Oppenheim when you first heard it in your office?

MR. BRAZILE: On March 21st?

MR. LIGHTFOOT: Yeah.

THE WITNESS: I don't recall that I knew.

BY MR. LIGHTFOOT:

Q- All right.

But you're clear that you did not make the [p. 86] selection of Elliot Oppenheim off the list yourself?

A Right. I'm sure I didn't.

Q You have no recollection who did that?

A No.

Q Was Mr. Zoeller now up in your offices, your office itself, and the secretary's area at this time as you're preparing the search warrant?

A Was he where?

Q Was he in your office or in the general area of your office?

A I don't know where he was. He was working with Patty, I'm sure, in putting together the warrant. So I'm sure he was in the area.

Q Did you draft that portion of the probable cause affidavit which was added to the existing affidavit?

A Could I see that.

Q Sure.

I don't want to interrupt you, but I'm talking about that portion of the affidavit that begins on page 7, line 15 and proceeds to the end of the affidavit.

A Right. Yeah.

I can't recall who actually used this language, whether this was that paragraph which begins on line 15 or - something that Les Zoeller drafted or I drafted, I don't know.

* * *

[p. 115] Grand Jury room.

Q You had not read the provisions of 1524 that morning, as I recall your testimony?

A Correct.

Q Were you aware of the requirements and procedures that Mr. Oppenheim had to follow as a special master?

A What specifically are you referring to?

Q Well, are you aware today that there are certain requirements that are placed on a master at the time he begins to execute the warrant and during the execution of the warrant?

A I haven't looked at the provisions lately.

Q Were you aware of those provisions on the morning of March the 21st?

MR. BRAZILE: The question is vague and ambiguous as to "aware of those provisions."

Do you mean that they existed, the specifics, in the entire section?

MR. LIGHTFOOT: No. In his mind on the morning of March 21, 1995.

Q Were you, Mr. Conn, aware that there were particular requirements that were placed on a special master by Section 1524 before and during the execution of a warrant under that section?

[p. 116] A I don't know what special requirements you're referring to.

Q Were you aware of any special requirements?

A As I said, I've read 1524 in the past. I cannot tell you right now what's contained in 1524.

Q Let me just read from Section 1524 (c)(1). "At the time of the issuance of the warrant the court shall appoint a special master in accordance with subdivision (d) to accompany the person who will serve the warrant. Upon service of the warrant, the special master shall inform the party served of the specific items being sought and that the party shall have the opportunity to provide the items requested."

On the morning of March the 21st, were you aware that it was the duty of the special master to inform the party that he had an opportunity to provide the items requested?

MR. BRAZILE: Objection. It's irrelevant and [p. 117] immaterial to this case because the search of Mr.

Gabbert has already been declared legal. But I'll allow the witness to answer the question as to what his knowledge was of 1524 at that time.

If you have knowledge or if you don't know, you can tell him that.

THE WITNESS: I didn't recall the specific provisions of 1524 that morning.

BY MR. LIGHTFOOT:

Q Did you hear Mr. Oppenheim advise Mr. Gabbert to that effect?

A I don't recall a conversation between Mr. Oppenheim and Mr. Gabbert.

Q And you didn't so advise Mr. Gabbert of that provision, I gather?

A No. I did not advise him at all.

Q And you didn't hear Ms. Najera advise him of that?

A No.

Q Were you aware that under Section 1524 that if the subject of the search warrant objected to the disclosure of documents, that the items were to be sealed and brought to a court?

MR. BRAZILE: Objection. Irrelevant and immaterial. That search of Mr. Gabbert has already been [p. 118] declared legal and dismissed as part of the claims in this action. However, I'll allow the witness to answer the question as to his knowledge.

And keep it in mind that you were not the special master.

THE WITNESS: Right.

As I said, I was not – I did not think to the specific provisions of 1524 that morning.

BY MR. LIGHTFOOT:

Q So you didn't hear Mr. Gabbert advised of that provision in 1524 yourself by anyone – is that correct? – that morning?

A Correct.

Q And you didn't advise him of that yourself?

A Correct.

Q And to the best of your knowledge, no one provided Mr. Oppenheim with an envelope in which to seal any documents before he began the execution of the warrant; is that correct?

MR. BRAZILE: Objection. Lack of foundation. Calls for speculation and conjecture on the part of this witness. But he can answer the question.

THE WITNESS: As I said, no. I'm not aware of anyone giving him an envelope.

* * *

[p. 135] Q But that Return indicates that no property was seized.

Is that still your best recollection that no property was seized?

A My recollection is that I did not see anything taken from Mr. Gabbert.

Q Now, you recall that at some point later in the morning – by the way, do you know Mr. Richard Hirsch?

A Yes.

Q You met Mr. Richard Hirsch?

A Yes.

Q And when you met him, you understood that he was there as Mr. Gabbert's attorney; is that correct?

A Yes. I guess you can say "as his attorney."

Q At the point where you came out of the Grand Jury and listened to Mr. Oppenheim and after listening to Mr. Oppenheim, did you direct Mr. Zoeller to search the briefcase of Mr. Gabbert?

A I remember I was involved in that conversation. I didn't direct him. I indicated – I believe I indicated to Mr. Gabbert at that point that the investigating officer would take a look at the briefcase now.

Q And you understood that to be a search?

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,)	
Plaintiff,)	
vs.	)	No.
	)	CV 94 4227
DAVID CONN, CAROL NAJERA,	)	RSWL(Ex)
ELLIOT OPPENHEIM, LESLIE)	
ZOELLER AND DOES 1 through X,)	
Defendants.)	

DEPOSITION OF PATTIJO FAIRBANKS,

taken on behalf of the Plaintiff, at 655 South Hope Street,
13th Floor, Los Angeles, California 90017, commencing at
2:05 P.M., Thursday, August 10, 1995, pursuant to notice,
before Jo Ann C. Iwamasa, CSR 7557, RPR.

APPEARANCES:

FOR THE PLAINTIFF:

TALCOTT, LIGHTFOOT, VANDEVELDE,
WOEHRLE & SADOWSKY
BY: MELISSA N. WIDDIFIELD
655 South Hope Street, 13th Floor
Los Angeles, California 90017

FOR DEFENDANTS DAVID CONN AND CAROL
NAJERA:

KEVIN C. BRAZILE
Principal Deputy County Counsel
650 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012

FOR DEFENDANTS ELLIOT OPPENHEIM AND
LESLIE OPPENHEIM:

FRANSCCELL, STRICKLAND, ROBERTS &
LAWRENCE

BY: SCOTT D. MAC LATCHIE
225 South Lake Avenue, Penthouse
Pasadena, California 91101-3005

* * *

[p. 10] A I just really don't recall.

Q When did you start working in the district attorney's office?

A 1978.

Q Did you do anything else between your property management and -

A Actually, correct that. 1979. I became employed by L.A. County in 1978.

Q Where did you initially work for L.A. County in 1978?

A Department of Social Services.

Q What did you do for them?

A I was secretary to a director.

Q Did you do anything else between your property management and starting at Department of Social Services?

A No.

Q Where were you first assigned?

A Consumer Protection Division.

Q Where was this located?

A 320 West Temple Street.

Q What was your job there?

A Initially, senior legal secretary. Ultimately, senior office assistant to the head deputy.

Q And how long did you have that position as [p. 11] senior office assistant?

A Actually, in consumer, about seven years.

Q Were you transferred to another division?

A Yes.

Q And I take it that would have been 1986. Is that correct?

A You'd have to look at my personnel records.

Q Where were you transferred to?

A Organized Crime Division.

Q What was your title then?

A Again, you'd have to look at my personnel records. It's changed over the years due to upgrades in positions, but basically, it's the same thing, a version of what I am today, and that's senior legal assistant.

Q What do those duties entail, or what did those duties entail in the Organized Crime Division?

A Just basically the senior legal assistant for the division. They're varied. It borders on paralegal type of assignments.

Q Can you give me an example of what some of those duties are?

A In the Organized Crime Division, I was assigned to help prosecute the - help the prosecutors on the Cotton Club case.

Q Did you work for Mr. Conn?

[p. 12] A Yes, I did.

Q When you say "help the prosecutor," did you function as support staff?

A Yes. I coordinate witnesses. I do anything that they need done as far as assistance.

Q Did you help prepare search warrants?

A No. Well, I did not write them.

Q Would you type them out for law enforcement?

A I have been known to type search warrants, yes.

Q And in Organized Crime, did you work for more than one deputy?

A At the point that I was assigned to Organized Crime, I more or less worked according to cases, not according to deputies.

Q Did you work more for one deputy than another?

A Yes.

Q Did you work more for Mr. Conn than other deputies?

A No.

Q Who did you work for?

A Dale Davidson.

Q How long were you in the Organized Crime [p. 13] Division?

A I don't recall. The division underwent name changes. I went to Career Criminal for a while. I went back to work to Organized Crime which became Special Crimes which became Major Crimes but - well, no. Strike Major Crimes.

While in Special Trials, I should say, I was put on Special Assignment and remained there.

Q What was the special assignment?

A The Simpson prosecution team.

Q When were you assigned to the Simpson prosecution team?

A June 12, 1994.

Q Okay. So what would your title have been in March of 1993?

A It's -

MR. MAC LATCHIE: '94.

BY MS. WIDDIFIELD:

Q '94. Excuse me.

A Same as it is now. Senior legal - quite frankly, I'm not sure what the legal term is. I think it's senior legal office support assistant.

MR. BRAZILE: That's close enough.

BY MS. WIDDIFIELD:

Q What was the title of the division you were [p. 14] working in at that time?

A Special Trials or Special Crimes. Special Trials.

Q Okay. How many attorneys were in Special Trials at that time?

A I don't know.

Q Was there more support staff than just you at that time in Special Trials?

A Yes. I think I supervised, too.

Q You supervised, too. Okay.

And I take it Mr. Conn was in Special Trials at that time?

A Yes.

Q And I take it you worked closely with Mr. Conn?

A No.

Q No?

A No closer than anyone else.

Q Just briefly, if you could give me sort of a run-down on what you do during the day or what you did during the day in March of '94 in the Special Trials in your position at that time.

A I have no consistent duties. Depending on who's in trial doing what case for different deputies, I do different things.

* * *

[p. 26] the grand jury or was scheduled to testify before the grand jury on that Monday?

A I don't recall.

Q Did Mr. Conn request your assistance in the grand jury process for that next Monday morning?

A I have no specific recollection at all.

Q When you came to work on that Monday morning, do you recall having any awareness that you were going to be working with Mr. Conn or Ms. Najera in the grand jury?

A If a grand jury was scheduled, yes, I'm sure I was aware of it, but I don't recall it.

Q Do you recall the first time that you saw David Conn on March 21st?

A No.

Q Do you recall going to the grand jury on March 21st?

A Going -

Q To the grand jury area.

A Physically walking down there?

Q Yes.

A No.

Q Did you, in fact, go down to the grand jury area?

A Yes.

* * *

[p. 29] Q Do you recall seeing any of those people up in the office, in the district attorney's office, that morning?

A I don't have any specific recollection.

Q Were you requested to type any documents by Mr. Conn that morning before you went to the grand jury area?

A I don't have any specific recollection.

Q Didn't he ask you to type an immunity letter for Ms. Baker?

A Not that I recall.

Q Before going down to the grand jury area that morning, did you assist in the preparation of a search warrant?

A I may have. I don't recall.

Q In fact, you helped Detective Zoeller prepare a search warrant application, didn't you?

MR. BRAZILE: Objection. Assumes facts not in evidence and misstates the testimony of the witness and there's a lack of foundation.

If that's true, you can answer, but if that's not true, don't adopt the answer she's posed in the question.

THE WITNESS: I don't recall.

[p. 30] BY MS. WIDDIFIELD:

Q Did you see Detective Zoeller in the district attorney's offices that morning before you went to the grand jury area?

A If he was there, I'm sure I saw him, but no specific recollection.

Q You have no recollection of assisting in the preparation of a search warrant application that morning?

MR. BRAZILE: Objection. The question has been asked and answered by the witness. She said she did not recall.

Do you want her to answer it again?

MS. WIDDIFIELD: Uh-huh.

THE WITNESS: I don't recall.

BY MS. WIDDIFIELD:

Q Were you requested, at some point that morning, to locate a special master?

A Yes.

Q And do you understand what a special master is?

A Yes.

Q Can you tell me what your understanding of what a special master is?

A Someone appointed by the Court to oversee

* * *

[p. 42] A Not specifically.

Q Generally do you recall?

A (No audible response.)

Q Do you recall seeing them again that day?

MR. BRAZILE: After Traci Baker -

BY MS. WIDDIFIELD:

Q After she knocked on the door.

A I have to say I'm sure I did, but I don't recall it.

Q Do you recall anything else that happened that morning?

A No.

Q Okay. Did Ms. Baker come specifically to you and say, "I need to speak to my lawyer"?

A I - I don't recall the specifics of that.

Q Do you recall if anybody else said that to you?

A It may have been conveyed to me through a bailiff.

Q Was it in the ordinary course of your duties to be the intermediary between the client -

A Yes. Finish the question. I'm sorry.

Q Have there been other occasions where you have been in the grand jury area assisting a district attorney investigating a case where the witness [p. 43] testifying before the grand jury has needed to speak to his or her attorney?

A Certainly.

Q Have they been allowed to do so?

A Oh, sure.

Q And so it's your understanding when a witness asks to speak to his attorney, that the witness be allowed to do so?

A Absolutely.

Q Where were you positioned in the grand jury area that morning?

MR. BRAZILE: At what point in time?

BY MS. WIDDIFIELD:

Q From the time you got there to the time you left, where were you?

A I am in many places there. So it's - at any specific time, I cannot tell you where I was or might have been.

Q Okay. Do you have any sense of how long you were in the grand jury area that morning?

A No, I don't.

Q Was it more than an hour?

A I have no idea.

Q Do you recall, at some point, David Conn and Carol Najera coming out of the grand jury room with

* * *

APPENDIX G

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,)	
)	
Plaintiff,)	
	)	No. CV 94-4227
vs.	)	RSWL (Ex)
)	
DAVID CONN, CAROL)	
NAJERA, ELLIOT)	
OPPENHEIM, LESLIE)	
ZOELLER and DOES 1)	
through X,)	
)	
Defendants.)	

Deposition of PAUL L. GABBERT, taken on behalf of Defendants, at 648 Kenneth Hahn Hall of Administration, 500 West Temple Street, Los Angeles, California 90012, commencing at 1:10 P.M. on Tuesday, the 4th day of April, 1995, before ELIZABETH A. HINES, CSR No. 9236, pursuant to Notice.

Reported by: ELIZABETH A. HINES,
csr No. 9236

Job No.: 95-0404EAH

APPEARANCES

For Plaintiff:

TALCOTT, LIGHTFOOT, VANDEVELDE,
WOEHRLE & SADOWSKI
BY: MICHAEL J. LIGHTFOOT, ESQ.
655 South Hope Street
Thirteenth Floor
Los Angeles, California 90017

For Defendants David Conn and Carol Najera:

DE WITT W. CLINTON, COUNTY COUNSEL
BY: KEVIN C. BRAZILE
PRINCIPAL DEPUTY COUNTY COUNSEL
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012

For Defendants Elliot Oppenheim and Leslie Zoeller:
FRANSCCELL, STRICKLAND, ROBERTS & LAW-
RENCE
BY: SPENCER C. FRIEGER, ESQ.
225 South Lake Avenue
Penthouse
Pasadena, California 91101

* * *

[p. 24] Fifth, Sixth Amendments and the attorney-client privilege.

Q. BY MR. BRAZILE: At any time from February 11th, 1994 to March 21st, 1994, did you have any telephone conversations with David Conn?

A. Yes.

Q. On how many occasions?

A. I don't recall.

Q. More than one?

A. Yes.

Q. More than five?

A. I'm not sure.

Q. When was the first time that you spoke with Mr. Conn from the time period of February 11th, 1994 to March 21st, 1994 by telephone?

A. I don't recall.

Q. What did you discuss with him during the first conversation?

A. The only thing I recall discussing with him during my first conversation was that I was representing the witness, Tracy Baker.

Q. Did you tell him anything else?

A. I may have.

Q. Do you remember anything else you told him?

A. I don't remember at this time.

Q. When is the next time you had a telephone

* * *

~~[p. 27]~~ with Carol Najera during that period of time?

A. I don't recall.

Q. Was it in February or March?

A. I don't recall.

Your question was from March 11th. Did you mean March 11th or February 11th?

Q. I meant February 11th.

A. All right. The answer would be the same. I talked to Ms. Najera on the telephone on at least one occasion. The occasion I remember the date of was March 17, 1994.

Q. And what did you discuss with her?

A. The fact that Mr. Zoeller - I didn't really discuss things with her. She told me some things.

Q. What did she tell you?

A. She said Mr. Zoeller would be late for the 1:00 o'clock appointment.

Q. What 1:00 o'clock appointment was she referring to?

A. Well, there was no 1:00 o'clock appointment. Mr. Zoeller was to appear at my office, serve Ms. Baker with a grand jury subpoena pursuant to my prior arrangement with, I believe, Mr. Conn, at noon, on Thursday, March 17th.

Q. Did Mr. Zoeller appear and serve a subpoena on [p. 28] that particular day at 1:00 o'clock?

A. No.

Q. Why not? Do you know?

A. Well, he appeared ~~and didn't appear~~ [but not /s/ PLG] at 1:00 o'clock.

Q. What time did he get there?

A. He got there sometime - my recollection is around 2:00 or 2:15.

Q. To your office?

A. Yes, sir.

Q. Where was Ms. Baker at that time?

A. At the time he arrived?

Q. Yes. Was she at your office or somewhere else?

A. At my office in - at my office building in my office when he arrived.

Q. What happened when Mr. Zoeller arrived?

A. The receptionist told me that Mr. Zoeller had arrived. I went out and greeted Mr. Zoeller. I invited him into my office. I believe he said hello to Ms. Baker.

Q. Was she in your office at that time - Ms. Baker?

A. Yes.

He served her with the subpoena. He stated or uttered some words with respect to wanting her cooperation.

* * *

[p. 86] damages that he is now claiming as a result of this lawsuit. I don't see - this is not a verified client [complaint /s/ PLG]. He didn't sign the complaint. Therefore, I'm entitled to know what he is claiming as his damages, his general damages that are claimed.

(Whereupon, a discussion was held between the deponent and his counsel out of the hearing of the reporter.)

THE WITNESS: Well, to amplify in [on /s/ PLG] paragraph 59 of the complaint, where I believe the question is answered, on the day in question, I suffered the violation of my constitutional right to practice my profession. The execution of the warrant shocked, surprised, angered me. It was an affront to my dignity.

Q. BY MR. BRAZILE: The execution of the warrant; correct?

A. Yes. It made me the target of a search in a criminal proceeding. It upset me. It outraged me. It impaired my ability to confer with and rationally advise my client.

With respect to the subject matter of my representation, it divided my interest between my sense of privacy, which was being invaded, and the personal security of my own person and my effects. Divided me between my personal concerns of obtaining counsel for myself, thinking [p. 87] about what the special master was doing as he ran roughshod over the Penal Code, among other things, and my duty to my client.

And it interfered and impaired my state of mind. It upset me. It affected my reputation because the search warrant was a public record. There were articles published in the LOS ANGELES TIMES, the LOS ANGELES DAILY JOURNAL and the METROPOLITAN NEWS, which put me in an unfavorable light as the subject of a search regarding evidence in a notorious murder prosecution. This affected not only my reputation in the community at large, but within the legal profession as well as within my practice of criminal law.

Office personnel at the building where I practice were made aware of this. My secretary knew about this. Numerous lawyers knew about this. At least one of my neighbors knew about this. But for the privacy that attaches in legal proceedings, I was in the general sense defamed. My privacy was invaded because I was associated with criminal activity in an unfavorable light.

(Whereupon, a discussion was held between the deponent and his counsel out of the hearing of the reporter.)

THE WITNESS: I was particularly surprised and outraged by the misrepresentations that were made to me by [p. 88] a fellow member of the bar, Mr. Conn, who lied to me about the immunity agreement.

In my experience in practicing criminal defense for a number of years - and I have advised ~~numerous counsels~~ with [/s/ PLG] numerous clients before grand juries - I find that a grand jury hearing is inherently stressful for the client. The client is always nervous.

In this particular situation, the client was a target of a perjury investigation and had been asked to bring documents, the production of which tended to incriminate [her /s/ PLG]. Immunity had been refused prior to that date. And now the lawyer who was supposed to be her champion and advocated to protect her before that tribunal was being searched and literally carried away.

This impaired the relationship of special trust and confidence that inures in the attorney-client relationship because she was looking at me and I'm being searched. How am I going to protect her? How can she really rely on my advice if this is being done to me? She is a layperson.

Those are the ways in which I was damaged that day and since then, and those are the ways in which my relationship with my client was interfered with, impaired and damaged.

Q. Well, first off, when she was before the grand

* * *

[p. 95] we can submit responses in writing to that effect as well.

MR. BRAZILE: All right.

Q. Now, you are also alleging damage to your reputation; correct?

A. Yes.

Q. Now, do you base that upon the search or the fact that you couldn't have access to your client?

A. I base it upon what took place during that day. My relationship with the client, what was depicted in the search warrant and the articles that were on the subject by various newspapers, as well as the dissemination of the information that occurred that day throughout the legal community of Los Angeles County.

Q. As a result of your claim of not being able to practice your profession, that particular right, what damages are you seeking?

MR. LIGHTFOOT: Asked and answered. I object to that.

MR. BRAZILE: Are you instructing him not to answer?

MR. LIGHTFOOT: I am.

MR. BRAZILE: Now, I'll go back to my last area, and I'll turn it over.

Q. Earlier I asked you the question regarding did Tracy Baker ever tell you that while she was testifying before the grand jury she was denied the opportunity to

* * *

[p. 100] impatience in my mis[/s/ PLG]representation of Ms. Baker, who he was now in the process of taking in front of a duty judge to be held in contempt.

Q. You did not feel it was important to speak to him or even mention the fact that you had not been allowed to speak to your client?

A. I thought lots of things were important, but this was not my first duty of business in that the point it -

Q. You didn't give any kind of insight into the fact that his secretary had mentioned anything to you while you were in the first search?

A. Not to my recollection, sir.

Q. Approximately how far away was David Conn's secretary when she made that statement?

A. I think she was at the door to a secretarial space or an office space. I guess she was about ten feet away.

Q. Did Mr. Oppenheim say anything to David Conn's secretary after she made her statement?

A. Not to my - not to my recollection.

Q. Did he make any kind of expression to the best of your knowledge?

A. Other than Mr. Oppenheim's gratuitous comments about various dress sizes on [in /s/ PLG] my personal calendar, he [p. 101] seemed to be very concerned to move the search along, and he wanted to copy my attorney-client [/s/ PLG] privileged notes with Ms. Baker.

I don't recall him saying anything to a secretary.

Q. Did he say anything to you regarding the fact that your client allegedly wanted to speak to you?

A. I don't think so. He kept reading the search warrant and then going back to my items. I don't think he said anything about that.

Q. You mentioned that - you testified earlier that you had a brief discussion with Mr. Oppenheim after the second search; is that correct?

A. I had a discussion with him. I believe it was outside of Department 110, yes.

Q. And you testified that he had said that the documents he reviewed were not privileged because there was no stamp of "confidential" on those documents?

A. Yeah. I don't think he said, "no stamp of confidential." Or he said, "no stamp on it [that it /s/ PLG] was privileged."

Q. Is that the first time he made that statement?

A. It was the only time he made the statement.

Q. So throughout the first search, he didn't indicate anything about a stamp of confidentiality?

[p. 102] A. Correct.

Q. During that first search, what were your statements regarding the confidentiality regarding the documents?

A. What were my statements?

Q. Yes.

A. "This is a client's file. It's, again, privileged attorney-client communications. Are you still going to search this?"

"Yes."

"This is a client's file. It's got attorney-client privilege. Are you still going to search this file?"

"Yes."

"This is Ms. Baker's file. This has some notes of my interviews with her. Are you still going to search this?"

"Yes." Where he proceeded to read and read it read and asked me if he could copy it. This not in any sequence. I don't know which filing we are dealing with first. But - and I'm sure I made similar comments with respect to items in my calendar, items on a yellow legal tablet that contained clients' names and information about the clients.

And his response was, "move it on. I still [p. 103] want to look at it."

Q. Did you take the time to tell him why you believed those clients were privileged?

A. Yeah, I told him they were my clients, and they were my clients' files, and they contained privileged communications. And he didn't bat an eye.

Q. Did you tell him anything other than the fact that it contained privileged information?

A. Other than with respect to Ms. Baker's files, no.

Q. Did you ask him why he believed those files were not privileged

A. Other than outside of 110, no.

Q. So during the course of the - now you had testified that that search took 20 minutes. So during that 20 minutes, you didn't ask him, again, why he believed those files were not confidential; is that correct?

A. He never said he didn't believe they were confidential. I told him they were confidential and privileged. He ignored and searched them anyway.

There was no point in going any further with Mr. Oppenheim.

Q. So throughout the course of the 20 minutes, is it your testimony that he ignored you?

A. He ignored the assertions of privilege on

* * *

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	No.
Plaintiff,	)	CV 94 4227 RSWL (Ex)
)	
vs.)	
DAVID CONN, CAROL)	
NAJERA, ELLIOT)	
OPPENHEIM, LESLIE)	
ZOELLER and DOES I)	
through X,)	
Defendants.)	
)	

DEPOSITION OF CAROL NAJERA,

taken on behalf of the Plaintiff, at 655 South Hope Street, Thirteenth Floor, Los Angeles, California 90017, commencing at 10:32 a.m., Thursday, August 3, 1995, pursuant to Notice, before Barbara Walsh, CSR #4134, RPR.

APPEARANCES:

FOR THE PLAINTIFF:

TALCOTT, LIGHTFOOT, VANDEVELDE
WOEHRLE & SADOWSKY
BY: MELISSA N. WIDDIFIELD
MICHAEL J. LIGHTFOOT
CARLA M. WOEHRLE (not present)
655 South Hope Street, Thirteenth Floor
Los Angeles, California 90017

FOR DEFENDANTS DAVID CONN
and CAROL NAJERA:

COUNTY OF LOS ANGELES
DE WITT W. CLINTON, County Counsel
BY: KEVIN C. BRAZILE
Principal Deputy County Counsel
650 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012

FOR DEFENDANTS ELLIOT OPPENHEIM
and LESLIE ZOELLER:

FRANSCCELL, STRICKLAND, ROBERTS
& LAWRENCE
BY: SCOTT D. MacLATCHIE
225 South Lake Avenue
Penthouse
Pasadena, California 91101-3005

* * *

[p. 47] warrant?

A She wanted to know if she could leave and go out
and get Chinese food.

Q Did you understand her to be represented by
counsel at the time?

MR. MacLATCHIE: Objection. Vague.

THE WITNESS: She may have been.

BY MS. WIDDIFIELD:

Q Did you have any awareness whether Paul Gab-
bert represented her at the time?

MR. MacLATCHIE: Same objection.

(Mr. Lightfoot reenters deposition room.)

MR. BRAZILE: If you know, you can answer.

BY MS. WIDDIFIELD:

Q Don't speculate. Give me your best estimate.

A I think I knew but I'm not sure. I don't remember
if I knew. I think I knew.

Q So you think you knew she was represented by
Mr. Gabbert at that time?

A I think. But I couldn't swear to it.

Q While you were in her home, did she at any time
say that she wanted to speak to her lawyer?

A Yes.

Q Do you recall when she said that?

A No.

* * *

[p. 50] A I don't know.

Q Did you - when I say "you," I mean you collec-
tively: Mr. Conn, Detective Zoeller and the other officers
- did you find what the search warrant was seeking at
Ms. Baker's house?

A We found some of what we believed - some items
we believed were covered by the search warrant, yes.

Q What items were there?

A You have to refer to the attorney service -

Q Let me ask you this question. Did you feel you still needed additional information from Ms. Baker after leaving the house?

MR. BRAZILE: Objection. Attorney work product and government privileged information. The witness is instructed not to answer.

BY MS. WIDDIFIELD:

Q At the time of the search, was it your understanding that Ms. Baker was still supposed to appear before the Grand Jury on Monday, March 21?

A I believe she was.

Q Do you recall whether Mr. Gabbert ever sought to have her appearance delayed at any point?

A I remember hearing something about a delay, but I couldn't tell you when.

Q Who did you hear that from?

* * *

[p. 94] Q Did he say anything to you?

A Not to me.

Q Did he say anything to Mr. Conn?

A Yes.

Q What did he say?

A They had a discussion.

Q Did you overhear the discussion?

A Yes.

Q What was said during this discussion?

A Mr. Oppenheim said that there was nothing privileged in any of the documents that he examined.

Q Did Mr. Conn ask him what the basis for his decision was?

A I believe he may have. But I don't recall the response.

Q What did Mr. Conn then do?

A I don't recall what Mr. Conn did.

Q What did you do?

A I was standing there. And then -

Q Had Mr. Oppenheim seized any document from Mr. Gabbert?

A I think so.

Q Do you recall what that document was?

A I think it was a letter that Traci Baker had. It may have been all of it.

[p. 95] Q What did Mr. Oppenheim do?

A I don't know if he seized it or he had the bailiff seize it.

Q But it was that morning?

A I believe it was that morning. Or it might have been Mr. Gabbert pulled it out. I don't remember.

Q Where did that letter end up?

A It's in evidence, I believe. On the return.

Q Wasn't it on the return of the search warrant or shouldn't it have been?

A Yes.

Q The document that either Detective Zoeller or Mr. Oppenheim received from Mr. Gabbert, that was in fact the document that both the Grand Jury subpoena and the search warrant sought, wasn't it?

A Not technically.

Q That's what you were looking for, wasn't it? A letter from Lyle Menendez to Traci Baker?

A That's what we were looking for, but that's not what we got.

Q I thought you just stated that's what you got.

MR. BRAZILE: Well, objection -

BY MS. WIDDIFIELD:

Q What else were you looking for if that wasn't it?

A The rest of the letter.

* * *

APPENDIX I

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,)	
Plaintiff,)	
vs.	)	No. CV 94 4227
DAVID CONN, CAROL NAJERA,	)	RSWL(Ex)
ELLIOT OPPENHEIM, LESLIE)	
ZOELLER AND DOES 1)	
THROUGH X,)	
Defendants.)	

DEPOSITION OF ELLIOT OPPENHEIM,
taken on behalf of the Plaintiff, at 1215 Beverly
Estate Terrace, Beverly Hills, California 90210,
commencing at 1:47 P.M., Friday, June 30, 1995,
pursuant to Notice, before Joanne Hokyo, CSR
#9169.

APPEARANCES:

FOR PLAINTIFF PAUL L. GABBERT:

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FOR DEFENDANTS DAVID CONN AND CAROL
NAJERA:

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Principal Deputy County Counsel
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ALSO PRESENT: LESLIE ZOELLER

* * *

[p. 14] Q Prior to March 21, 1994, how many
searches did you conduct as a special master?

A I can only remember one at this point in time.

Q One other than the medical malpractice -

A Uh-huh. No. That's the only one I can remember.

Q So the only one you can remember is the one
about 10 years ago relating to a medical malpractice case?

A Yes.

Q Do you recall, Mr. Oppenheim - and I know this
was a while ago. But since it's the only case we have to
work with at the moment, I'm going to try to probe your
memory on this case.

A Pardon me for interrupting.

I have a glimmer of memory with - the State High-
way Patrol went with me on a raid on a Russian immi-
grant's office on Fairfax. They took measurements of all
the rooms, photographs.

Q Do you recall when this was?

A Do I recall what?

Q When this occurred?

A A number of years ago.

Q Would it be five years ago?

A Or more.

[p. 15] Q Or more.

Was this a doctor's office or -

A Yes. It was a woman, a Russian woman doctor's
office.

Q I'm going to go back to the first instance you
described 10 years ago of the medical malpractice case.

Aside from the pamphlet that you have described
that you received in the mail, were you given any other
instructions before going out to the doctor's office to
conduct the search?

A No.

Q At the doctor's office, do you recall if the doctor
was present when you conducted the search?

A Yes.

Q Do you recall the doctor at any time telling you that certain of his files were privileged?

A This was a woman doctor.

Q The first one was a woman doctor as well?

A It's just a woman doctor. That's it.

Q Then I may be confused.

A You are.

Q I thought that there were two cases that - two different instances when you acted as a special master.

[p. 16] A Let me understand which one you're talking about now.

Q I'm going back to the first one 8, 10 years ago, a doctor's office -

A Okay.

Q - was that a woman doctor?

A No.

Q That's the one we're talking about.

That doctor - do you recall that doctor - and I take it it was a he -

A Uh-huh.

Q - did he say to you at any time "These files are privileged"?

A No. Quite the opposite. He said look at whatever you want to look at.

Q Were there any documents taken from that doctor's office that were sealed?

A No. Not to my recollection.

Q Were there any documents that the doctor requested be sealed?

A No.

Q Let's go now to the second case you referred to with the woman doctor in which you accompanied the State Highway Patrol.

In the course of that search, was the [p. 17] doctor present?

A Yes.

Q And did the doctor say to you that these are my privileged files?

A No.

Q Did she at any time request that any of the files be sealed?

A No.

Q Prior to March 21, 1994, based on your reading of the pamphlet and based on whatever other information you might have had, what did you understand your role as a special master to be when going into a doctor's office or attorney's office to conduct a search?

A For one thing, to advise the person what his rights were.

Q And what did you understand those rights to be?

A That they could remain silent. Basically whatever the Miranda rights are, although I did not recite them.

Q Is there anything else you recall as being your role?

A Huh-uh. No.

Don't shake your head.

THE REPORTER: Yes.

[p. 18] BY MS. WIDDIFIELD:

Q What did you understand that you were supposed to do once you went into, in these cases, a doctor's office?

A I thought I'd answered that.

Q Well, perhaps I didn't get a full answer. And if you could answer that again for me, I would appreciate it.

A To generally inform the person of his rights and that they did not have to disclose any information that might result in their being charged with a crime. Basically that was it.

Q What else were you then supposed to do after you advised them, the doctor, attorney, of their rights?

A I can't recall.

Q Were you supposed to go in and search the premises pursuant to a warrant?

A No.

Q In the two instances in which you acted as a special master, were you advised by law enforcement on what to do once you got to the premises?

A I don't recall that I was.

Q Let's take just one instance. Let's refer to the Highway Patrol search. I will call it that for [p. 19] shorthand where you referred to the female doctor.

When you got to the doctor's office and after you advised the doctor of her rights, what did you then do?

A Nothing that I recall.

Q Did you go through the doctor's files?

A I don't recall.

Q Do you recall doing anything at the doctor's office?

MR. MACLATCHIE: Other than advising.

THE WITNESS: I probably did.

BY MS. WIDDIFIELD:

Q But you don't recall what?

A No.

Q The pamphlet that you received - I guess it would be in approximately 1985 or 1987 from the State Bar, prior to becoming a special master - with reference to that document, did you receive any updates of that pamphlet at any time, at any later point in time?

A No.

Q That was the only document you received from the State Bar regarding the procedures of a special master?

A Yes.

Q I would like to have the reporter mark

* * *

[p. 35] file; is that correct?

A No.

Q You glanced at his accordion file?

A Pardon?

Q You glanced at his accordion file?

A Right.

Q How were you able to glance at his accordion file?

A My eyes were open.

Q Did you ask him if you could look at his files?

A I have no recollection. I had a search warrant issued by Judge Pounders which he complained about. And I said, "Take it up with Judge Pounders."

Q Do you recall what Mr. Gabbert's complaint was?

A I'm not sure of this. But it might have been that he had things in his briefcase that were confidential, his own notes, for example.

Q So he told you that he had confidential material in his belongings; is that correct?

A Read that back. How did I answer that? Isn't that what I just said?

(Record read.)

[p. 36] BY MS. WIDDIFIELD:

Q Did you seal those notes when he told you that they were confidential?

A Did I see them?

Q Seal them.

A Seal them, no.

Q Why didn't you seal them?

MR. MACLATCHIE: Objection. Argumentative.

MR. BRAZILE: Also irrelevant. The search has already been declared lawful.

BY MS. WIDDIFIELD:

Q Mr. Oppenheim, I would like to direct your attention to the exhibit in front of you. If you could turn the page, please.

A Special Master Guidebook.

Q Correct.

A Turn what page?

Q I would like to turn to page 2, please.

A 2?

Q That's correct.

A (Witness complies.) Okay.

Q Actually, what I would like you to do is go to page 7.

A Are you sure?

Q I'm sure.

* * *

APPENDIX J

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,)	
Plaintiff,)	
vs.	)	No. CV 94 4227
DAVID CONN, CAROL NAJERA,	)	RSWL(Ex)
ELLIOT OPPENHEIM, LESLIE)	
ZOELLER AND DOES 1)	
THROUGH X,)	
Defendants.)	

DEPOSITION OF LESLIE ZOELLER, taken on behalf of the Plaintiff, at 655 South Hope Street, Thirteenth Floor, Los Angeles, California 90017, commencing at 10:21 A.M., Tuesday, August 1, 1995, pursuant to Notice, before Joanne Hokyo, CSR #9169.

APPEARANCES:

FOR PLAINTIFF PAUL L. GABBERT:

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* * *

[p. 71] A I don't recall. Generally, Mr. Conn and Ms. Najera were together during the conversations that I had with them.

Q So it was on the speaker phone?

A Not necessarily, no.

Q Your understanding is that she would be present in the room with Mr. Conn?

A Yes.

Q I take it you, in fact, did obtain a search warrant for Ms. Baker's residence?

A Yes.

Q And when did you serve that search warrant?

A On the 18th of March.

Q At what time?

A I don't recall. It was in the evening of the 18th, somewhere around 7:30, I believe.

Q Who else was there to serve the search warrant?

A My partner Detective Steve Miller, David Conn and Carol Najera.

Q Is Steve a man or a woman?

A A man.

MS. WIDDIFIELD: Just off the record for one second.

[p. 72] (Whereupon a recess was taken.)

BY MS. WIDDIFIELD:

Q When we left off, we just had arrived at Traci Baker's house to serve the search warrant on March 18th.

A That's correct.

Q And can you describe for me what happened when you arrived at Ms. Baker's house?

A We knocked on the door.

Q And when you say "we," is it all four of you - Conn, Najera -

A We were all at the door. I don't know who knocked on the door. I believe I did.

She answered the door. And I served the search warrant. I gave her - gave her a copy showing her the original or vice versa. But she ended up with the copy of the search warrant.

Upon reading the search warrant, she made a statement, "I shouldn't tell you this, but all the things that you're looking for are with my attorney."

Q How did this statement come about?

Did she just read the search warrant and spontaneously state that to you?

A That's correct.

Q Did she at any time say that she wanted her

* * *

[p. 75] Q Did Ms. Najera participate in the search?

A Yes.

Q Did Officer Miller participate in the search?

A Yes.

Q How long did the search take?

A Approximately an hour.

Q And what were you looking for?

A I was looking for correspondence between Traci Baker and Lyle Menendez.

Q Did you find any documents that were responsive to the search warrant?

A Directly, no.

Q And did you seize any documents?

A Yes.

Q If there weren't any documents responsive to the search warrant, why did you seize a document?

MR. GRANBO: Objection. Misstates -

MR. MACLATCHIE: Objection. Argumentative.

MR. GRANBO: Well -

BY MS. WIDDIFIELD:

Q You can answer the question.

MR. GRANBO: It also misstates his testimony.

BY MS. WIDDIFIELD:

Q I believe you stated there weren't any [p. 76] documents directly related to the search warrant; is that correct?

A Directly responsive, that's correct.

Q Can you tell me what you mean by "indirectly responsive" then.

A Indirectly responsive was articles pertaining to the Menendez case and information pertaining to the Menendez case.

Q Did you understand Ms. Baker to be represented by counsel at the time that you searched her residence on March 18th?

MR. MACLATCHIE: Objection. Vague and ambiguous. Lacks foundation. It's also irrelevant.

Instruct the witness not to answer.

BY MS. WIDDIFIELD:

Q At any time during the course of this search warrant search of Ms. Baker's residence on March 18th, did she state that she wanted to contact her attorney?

MR. MACLATCHIE: Same objection. Same instruction since the last time you asked that question.

BY MS. WIDDIFIELD:

Q Did she, in fact, attempt to contact her attorney?

MR. MACLATCHIE: Same objection. Same [p. 77] instruction.

BY MS. WIDDIFIELD:

Q This may be asked and answered. I apologize if I have.

Did you have any conversations with Ms. Baker while you were conducting this search?

A Yes.

Q And can you describe the substance of those conversations for me?

MR. MACLATCHIE: Same objection. Same instruction.

BY MS. WIDDIFIELD:

Q Did Ms. Baker have any conversation with Mr. Conn that you overheard?

A Yes.

Q And can you describe the nature of that conversation?

MR. MACLATCHIE: Same objection. Same instruction.

BY MS. WIDDIFIELD:

Q Did you overhear Ms. Baker speak to Ms. Najera?

A Yes.

Q And can you relate the substance of that conversation?

[p. 78] MR. MACLATCHIE: Same objection. Same instruction.

BY MS. WIDDIFIELD:

Q Did you overhear any conversations between Ms. Baker and Officer Miller?

A Yes.

Q Can you relate the nature of that conversation?

MR. MACLATCHIE: Same objection. Same instruction.

BY MS. WIDDIFIELD:

Q When you say that you did not locate any document directly responsive to the search warrant, can you describe for me what would have been "directly responsive" to the search warrant?

A Yes.

Exactly what is described in the search warrant.

Q And that would be?

A Correspondence between Lyle and Traci Baker.

J-8

May I add something?

Q Surely.

A Also within a search warrant, you have to show that the person has control of the location that you're intending to search. So a search warrant commonly

* * *

JAN 19 1999

CLERK

No. 97-1802

In The
Supreme Court of the United States
October Term, 1998

DAVID CONN and CAROL NAJERA,
Petitioners,
vs.

PAUL L. GABBERT,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

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Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662 (1986)	14
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Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720 (1977)	11

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O'Lone v. Estate of Shabazz, 482 U.S. 342, 107 S.Ct. 2400 (1987)	20

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ARGUMENT**I. PETITIONERS' SUMMARY OF THE EVIDENCE IS AN ACCURATE REFLECTION OF THE RECORD.**

Respondent contends that petitioner's summary of the evidence does not contain facts. *See* Resp. Br. on merits at p. 5, n.6. Respondent also contends that petitioners' reference to their own mental states are not undisputed. *See* Resp. Br. at p. 5, n.6. Respondent's contentions about the accuracy of petitioners' summary of the evidence are wrong because petitioners' summary of the evidence is an accurate reflection of the record below.

Petitioners' evidentiary summary of their own mental states is based on undisputed facts that are supported by the record. (2 J.A. 236 and 241). For example, when Traci Baker returned to the grand jury after her first request to consult with respondent was granted, she asserted her Fifth Amendment rights without advising either David Conn nor Carol Najera that she had not consulted with respondent. Consequently, both Conn and Najera believed that Baker had conferred with respondent as she had requested. (2 J.A. 235-236 and 2 J.A. 240-241). Once Traci Baker returned to the grand jury after her second request to confer with respondent was granted, she once again asserted her Fifth Amendment rights without telling either Conn nor Najera that she did not speak with respondent. (2 J.A. 235-236 and 2 J.A. 240-241).

The petitioners were convinced that Traci Baker had conferred with respondent each time she requested to do so based upon the way she asserted her Fifth Amendment rights and her failure to tell anyone she had not consulted with respondent, which is reflected in the record, when Conn and Najera state as follows:

"During Ms. Baker's grand jury testimony she requested on three (3) separate occasions to confer with her attorney. All three (3) of her requests to confer with her attorney were granted and *I believed* she conferred with her attorney on each occasion because on two (2) occasions she asserted her Fifth Amendment privilege on 'the advice of counsel', and

she never indicated or stated in any manner that she did not confer with her attorney when she was given permission to consult with him." (2 J.A. 236 and 241) (Emphasis added)

In contrast, respondent has not cited any part of the record which disputes the reasonable belief of Conn and Najera that Traci Baker had conferred with him when she was allowed to leave the grand jury hearing room. The absence of any evidence by respondent to controvert Conn and Najera's belief, renders undisputed the mental states of both Conn and Najera. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250, 106 S.Ct. 2505, 2511, (1986) (FRCP 56(c) provides that when a properly supported motion for summary judgment is made the adverse party must set forth specific facts showing that there is a genuine issue for trial); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, (1968) (In the face of defendants' properly supported motion for summary judgment, the plaintiff could not rest on his allegations of a conspiracy to get to a jury without any significant probative evidence tending to support the complaint). See also *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324, 106 S.Ct. 2548, 2553, (1986).

When a court determines a motion for summary judgment, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. See *Anderson v. Liberty Lobby, Inc. id.*, 477 U.S. at 248, 106 S.Ct. at 2510. Thus, factual disputes that are irrelevant or unnecessary will not be counted. See *Anderson v. Liberty Lobby, Inc., id.*, 477 U.S. at 248, 106 S.Ct. at 2510. The facts that are material to this Court's determination of the two questions for which certiorari was granted, are as follows:¹

¹ Respondent's statement of facts lists other facts that are either immaterial or irrelevant to the certiorari questions now before this Court. For example, it is immaterial that Detective Zoeller and Officer Miller, appeared unannounced at Baker's home although Zoeller knew she was represented by respondent who was not present. See Resp. Br. at p. 8. The questioning of Baker by Conn, Najera and Zoeller during the search of her

1. Respondent knew that he could not accompany Traci Baker inside the grand jury hearing room. (2 J.A. 334)
2. Traci Baker knew that respondent was not allowed to be with her during her grand jury testimony. (2 J.A. 376-377)
3. Respondent was not actively engaged in giving legal advice or counsel to Traci Baker when he was served with the search warrant. (2 J.A. 434-435 and 3 J.A. 532-533).
4. When the search warrant was served on respondent, he did not ask that the search be delayed until after his client was through testifying. (3 J.A. 541).
5. Each of Traci Baker's requests to consult with respondent were granted without any restrictions or limitations placed upon her by petitioners. (2 J.A. 235-236; 2 J.A. 240-241; 2 J.A. 370-371, 375, 378-379, 461-463, 467 469-471 and 3 J.A. 610-614).
6. When respondent was told that his client wanted to speak with him about her grand jury testimony he refused to talk to her. (2 J.A. 437-438).
7. The search warrant was valid and lawful. (Pet. App. A, p. A-20).
8. After the two searches respondent represented Traci Baker at the contempt proceeding. (3 J.A. 621-622)

All of the above-mentioned material facts are undisputed because there were no facts offered by respondent to contradict them. Consequently, the facts contained in petitioners' Summary of the Evidence may properly be considered by this Court

home on March 18, 1994, is also immaterial. See Resp. Br. at p. 9. Furthermore, Baker's state of mind before her grand jury testimony and upon hearing about her possible arrest is immaterial and cited for the purpose of emotional impact. See Resp. Br. at p. 13. Moreover, Baker's distress, upset and agitation when respondent did not speak with her is immaterial. See Resp. Br. at p. 15.

as part of its certiorari review because said facts are uncontroverted.

II. RESPONDENT'S BRIEF ON THE MERITS CONTAINS FACTUAL INACCURACIES THAT ARE NOT SUPPORTED BY THE RECORD.

Respondent's brief contains factual inaccuracies that petitioners will identify for this Court, because the inaccuracies that are being relied upon by respondent are not supported by the record. Respondent alleges in his Statement of Facts that Conn had planned that the warrant for Gabbert would be executed as Baker was summoned into the grand jury room to commence her testimony. *See* Resp. Br. at p.10. Respondent cites 3 J.A. 492; plus 495-497, as the evidentiary support for this spurious assertion. A review of the record at 3 J.A. 492 and 495-497 reveals that there is no mention or suggestion made by Conn that he planned to have the warrant executed on respondent when Baker was called before the grand jury. Therefore, this Court should reject respondent's baseless assertion that Conn planned the search to occur at the time Baker was to testify before the grand jury. *See Russell v. Southard*, 12 How. 139, 158-159 (1851) (This court must affirm or reverse upon the case as it appears in the record); *Adickes v. Kress & Co.*, 398 U.S. 144, 157-158 n. 16, 90 S.Ct. 1598, 1608 n. 16, (1970) (The lawfulness of the conviction and sentence of the defendant is to be determined by the formal record).

Respondent also makes the false contention that during oral argument before the Ninth Circuit, petitioners' counsel conceded that service of the warrant was timed to take advantage of the nervousness of Baker and the distraction it would cause the respondent.² Resp. Br. at p.36. A close review of the record shows that petitioner's counsel did not concede that Conn or Najera timed the service of the warrant to take

² Conn and Najera never stated or implied in their declarations (2 J.A. 233-242) nor in their deposition testimony (3 J.A. 483-547) that the service of the warrant on respondent was somehow timed to take advantage of Baker or respondent.

advantage of either respondent or Baker, because Mr. Renick responded as follows:

"THE COURT: and why did they choose not to?

MR. RENICK: Probably to take advantage and – I mean, without getting into whether or not that's – in fact, *let's assume* that they were doing that to take advantage." (*See* App. B of Resp. Br. on Merits at pp. 27-28) (Emphasis added)

Mr. Renick also made it clear to the Court of Appeal that Conn and Najera did not plan to prevent Baker from communicating with respondent³, by stating:

"THE COURT: But you just told us earlier that was part of their plan.

MR. RENICK: I'm saying we can assume. Let us *assume* that.

THE COURT: That's why they –

MR. RENICK: No, not – not – I certainly . . . , if I did, I apologize. *I never said that their purpose presumptively was to prevent communication.* If anything, it would have been Ms. Baker's being questioned to reveal information that she's reluctant to reveal". (*See* App. B of Resp. Br. on merits, at pp. 32-33) (Emphasis added)

Respondent further asserts in his Statement of Facts that Conn and Najera were determined, "by whatever means available", to obtain the letter from Lyle Menendez to Traci Baker and to win the trial. *See* Resp. Br. at p. 7. In support of this allegation respondent relies on two newspaper articles from the *Los Angeles Times*. *See* Resp. Br. at p. 7. Since these articles

³ There is no statement expressly or implicitly by Conn or Najera that they intended to prevent respondent from communicating with Ms. Baker. (2 J.A. 233-242).

are not part of the official record, there is no evidentiary basis for the factual assertions made by respondent. Hence, the allegation should be stricken and not considered by this Court.⁴

Respondent also makes the misleading contention that he was physically sequestered away from his client as a result of being served with the search warrant. *See* Resp. Br. at p.34. This assertion is disingenuous because when respondent was served with the warrant *he* requested a private room and his request was granted. (2 J.A. 435). In addition, both respondent and Baker knew they would be physically separated from each other when she testified before the grand jury regardless of whether a warrant was served. (2 J.A. 334, and 376-377).

III. PETITIONERS DID NOT CAUSE RESPONDENT'S FOURTEENTH AMENDMENT RIGHTS TO BE VIOLATED WHEN HE WAS SEARCHED WHILE HIS CLIENT WAS TESTIFYING BEFORE THE GRAND JURY.

The central issue before this Court is whether a prosecutor violates an attorney's rights under the Fourteenth Amendment by causing the attorney to be searched at the time his client is *testifying* before a grand jury. (3 J.A. 696). However, instead of directly addressing this issue, respondent's brief discusses unrelated issues and never fully responds to the first certiorari question. For example, respondent argues that Baker had a right to expect that the government would not interfere with her legal representation. *See* Resp. Br. pp. 20-23. This argument does not address either of the certiorari questions, because an alleged violation of Baker's rights cannot be the basis for establishing a violation of respondent's rights. *See* *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205 (1975)

⁴ Newspaper articles are generally inadmissible hearsay that are not considered by courts when ruling on a motion for summary judgment. *See, e.g. Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 1993); *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742-743 (7th Cir. 1997); *Bonilla v. City of San Diego*, 755 F.Supp. 293, 298 n.5 (S.D. Cal. 1991).

(Plaintiff cannot rest his claim for relief on the rights of third parties).

Respondent also contends that a lawyer's guidance to his client is critical at the grand jury stage because the client's liberty is at stake. *See* Resp. Br. pp. 23-26. Here again, respondent focuses on his client's rights as somehow providing the basis for a violation of his Fourteenth Amendment rights. Furthermore, this Court has twice suggested, though not held, that the Sixth Amendment right to counsel does not attach when an individual is summoned to appear before a grand jury, even if she is the subject of the investigation. *See United States v. Williams*, 504 U.S. 36, 49, 112 S.Ct. 1735, 1743 (1992). Since there is no Sixth Amendment right to counsel at a grand jury proceeding, a lawyer's guidance at the grand jury stage should not be deemed critical.

The reason respondent has failed to answer the first certiorari question is because a prosecutor does not violate an attorney's rights under the Fourteenth Amendment by causing the attorney to be searched *at the time* his client is *testifying* before a grand jury. The right to hold specific private employment and to follow a chosen profession free from unreasonable government interference falls within the liberty concept of the Fourteenth Amendment. *See Greene v. McElroy* 360 U.S. 474, 492, 79 S.Ct. 1400, 1411 (1959). However, the Constitution only protects liberty interests from state actions that threaten to deprive persons of the right to pursue their chosen occupation. *See Piecknick v. Com. of Pennsylvania*, 36 F.3d 1250, 1259 (3rd Cir. 1994); *Bernard v. United Township High School Dist. No. 30*, 5 F.3d 1090, 1092 (7th Cir. 1993).

To establish a Fourteenth Amendment substantive due process claim predicated on the right to practice one's profession, an attorney must show that he was banned or excluded from his profession. *See e.g. Wedges/Ledges of California, Inc. v. City of Phoenix, Az.*, 24 F.3d 56, 65 (9th Cir. 1994); *Federal Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 474 (9th Cir. 1991). Here, the record shows that respondent was neither banned nor excluded from the practice of law due to two primary reasons. First and foremost, each time Traci Baker made a request to consult with respondent, her request was

granted without any restrictions. (3 J.A. 610-614; 2 J.A. 461-463, 467 and 469-471). Secondly, when respondent was advised that his client needed to talk with him, he refused to speak with her. (2 J.A. 437-438).

Since respondent was neither excluded nor banned from practicing law, his Fourteenth Amendment right to practice his profession was not violated by Conn or Najera. Furthermore, petitioners did not unreasonably interfere with respondent's right to practice his profession, because Baker was released to speak with respondent during the search, but it was respondent who made the decision not to consult with her. (2 J.A. 437-438). In addition, respondent's Fourteenth Amendment rights were not violated when the warrant was served on him because he was not engaged in giving legal advice to Baker when the warrant was served. (2 J.A. 434-435 and 3 J.A. 532-533). Moreover, since respondent had no right to be present with Baker when she was testifying before the grand jury, the service of the warrant on him while she was testifying did not deprive him of his right to practice his profession.

A. The Petitioners Did Not Prevent Respondent From Communicating With His Client.

Respondent contends that Conn and Najera prevented him from communicating with his client. *See* Resp. Br. at pp. 28-30. This contention is specious because Conn and Najera gave Traci Baker access to respondent without placing any limitations on either of them. For example, each of Baker's requests to consult with respondent were granted. (2 J.A. 235-236; 2 J.A. 240-241; and 3 J.A. 610-614). When Traci Baker was allowed to leave the grand jury to consult with respondent, pursuant to her first request, Patty Jo Fairbanks informed respondent that his client needed to speak with him. (2 J.A. 438). Instead of taking the opportunity to speak with Traci Baker, respondent refused to do so and bluntly responded: "That's tough. They created this situation. They can wait as long as it takes." (2 J.A. 438). If Conn and Najera were truly attempting to prevent respondent from speaking with Baker, they would have stopped her from leaving the grand

jury hearing room, or limited the length or content of her discussion with respondent. Obviously, none of these kinds of restrictions occurred here.

Instead of refusing to speak with his client, respondent could have simply asked the special master, Elliot Oppenheim, to stop the search and leave the room so that he could speak with his client in private. There was no state law nor District Attorney's Office policy or regulation that prevented the special master from stopping the search to allow respondent to consult with his client. Further, Conn and Najera did not tell the special master that the search could not be interrupted. In addition, Conn and Najera did not do anything to prevent respondent from simply asking the special master to interrupt the search so that he could confer with his client.

If respondent had asked the special master to stop the search so he could consult with his client there would have been no reason for the special master to deny his request. Therefore, if respondent had asked, the special master would have stopped the search and left the room so that respondent could advise Baker in private. Thus, just as respondent's request for a private room to conduct the search was granted (2 J.A. 435); if he had only bothered to ask, the search would have been temporarily stopped.

In light of respondent's own actions, his claim that Conn and Najera either prevented him or interfered with his ability to speak with his client should be rejected by this Court. Similarly, the Ninth Circuit also rejected respondent's claim that Conn and Najera prevented him from speaking with his client due to the following:

THE COURT: How can he complain that his ability to communicate with his client, who needed his advice, was being impaired when he tells them, Look it. I don't want to talk with her?

If the real hub of the problem here was that the search warrant was executed at the very time the client needed advice from her lawyer, doesn't the

passage read to you from your client's own deposition suggested that he caused that conflict by his own actions.

THE COURT: Does the record show that he was – that if he had wanted to talk with her at that moment that he was physically restrained from doing so?

M. LIGHTFOOT: Well, I don't think the record speaks to that . . . " (See Resp. Br. on merits, App. B, at pp. B-5 thru B-6).

Since Conn and Najera did not prevent Traci Baker from having access to respondent, and because respondent chose not to speak with Baker, petitioners were not the cause of respondent's alleged failure to speak with his client.

B. Respondent Cannot Base His Fourteenth Amendment Claim Upon An Alleged Violation Of His First Amendment Rights Because He Failed To Raise A First Amendment Claim Below.

This Court granted certiorari on the question of whether respondent's Fourteenth Amendment rights were violated when he was being searched at the time his client was testifying before the grand jury. (3 J.A. 696). It is obvious from this Court's order that respondent's First Amendment rights are not properly before this Court. Nevertheless, respondent makes the claim that Conn and Najera violated his First Amendment rights. See Resp. Br. at pp. 33-35.

Respondent's attempt to somehow predicate his Fourteenth Amendment claim on an alleged violation of his First Amendment rights should not be considered by this Court, because a First Amendment claim is outside the bounds of the order of certiorari. See *Regents of the University of California v. Doe*, 519 U.S. 425, 117 S.Ct. 900, 905 (1997) (Court declined to address a question or argument that was not encompassed within the question certiorari was granted upon); See also *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, (1992). Furthermore, this Court should refuse to address respondent's newly raised First

Amendment argument because he failed to raise a First Amendment claim in either the district court or the Ninth Circuit.⁵ See *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. 189, 195, n. 2, 109 S.Ct. 998, 1003, n.2, (1989) (Argument made for first time in brief that was not pleaded in complaint; not argued to court of appeals; and not raised in petition for certiorari would not be considered); *Granfinanciers v. Nordberg*, 492 U.S. 33, 38, 109 S.Ct. 2782, 2788, (1989) (Court declined to address argument not raised below.); *Dothard v. Rawlinson*, 433 U.S. 321, 323, n.1 97 S.Ct. 2720, 2724, n.1 (1977) (Issue raised for first time in brief and not having been raised in District Court is not before Court); See also, *Youngberg v. Romeo*, 457 U.S. 307, 316, n. 19, 102 S.Ct. 2452, 2458, n. 19 (1982) and *Pennsylvania Dept. Of Corrections v. Yeskey*, ___ U.S. ___, 118 S.Ct. 1952, 1956 (1998).

Respondent concedes in his brief that his Fourteenth Amendment claim is based upon the substantive component of the due process clause. See Resp. Br. at pp. 27-28, n. 15. Since respondent is only making a substantive due process claim, he cannot look to the First Amendment as the basis for his relief. See *County of Sacramento v. Lewis*, 523 U.S. ___, 118 S.Ct. 1708, 1714-1715 (1998) (Substantive due process analysis inappropriate if respondent's claim is covered by the Fourth Amendment); see also *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871 (1989).

Due to respondent's failure to raise a First Amendment issue in either the district court or the court of appeal, and because of the limited scope of this Court's order of certiorari, petitioners' respectfully request that this Court decline to consider any First Amendment issues.

C. Petitioners Did Not Engage In Conscience Shocking Or Deliberate Indifferent Conduct.

This Court's cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be arbitrary in the constitutional sense. See

⁵ Respondent's Complaint fails to allege the First Amendment as the basis for his relief. (See 1 J.A. 24-28).

County of Sacramento v. Lewis, id., 118 S.Ct. at 1716; *Collins v. Harker Heights, Texas*, 503 U.S. 115, 129, 112 S.Ct. 1061, 1071 (1992). Respondent argues in part that petitioners' conduct shocked the conscience because they engaged in deception. See Resp. Br. at pp. 37-39. According to respondent's argument, Conn deceived him about giving Traci Baker immunity.⁶

Respondent's contention that Conn deceived him into believing Baker would be granted immunity is pure sophistry for a myriad of reasons. First, neither Conn nor respondent could agree on the type or extent of the immunity to be offered Baker. (2 J.A. 430; 3 J.A. 490-491). It was also unclear whether Baker would accept the use immunity being discussed by Conn and respondent. (2 J.A. 430). Further, Traci Baker had to provide a statement before she would be offered use immunity. (3 J.A. 489). Additionally, respondent was not inclined to accept the use immunity being contemplated by Conn. (2 J.A. 431). Moreover, respondent knew that notwithstanding the discussion of use immunity his client still had to testify before the grand jury, because Conn testified as follows at his deposition:

"... and he spoke about some sort of a letter outlining what it was that I was proposing. And I said, you know, 'If that will help, we could do that. But now is the time. Today's the day I would just like to do it now' and he said, 'I really can't do anything today. I would like to research this area'... so I said, 'All right. Let's just go downstairs, and we'll ask our questions. And if she's going to take the 5th, then she takes the 5th.'" (3 J.A. 491)

In support of his argument that petitioners engaged in conscience-shocking conduct respondent cites the case of *Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135 (1986). See Resp. Br. at pp.

⁶ Any alleged wrongful conduct by Zoeller and Miller in late February; or the prosecutor's search of Baker's home on March 18; or Conn's statement about whether Baker might surrender, are unrelated to respondent's Fourteenth Amendment rights, because an alleged violation of a third party's rights before the search on March 21, cannot be considered a violation of respondent's rights. See *Warth v. Seldin, id.*, 422 U.S. at 499, 95 S.Ct. at 2205.

37-38. Although this Court noted in *Moran* that police deception might rise to the level of a due process violation, this was not the holding of the court and it is better characterized as dicta. Furthermore, any alleged deception by Conn is insufficient to establish a substantive due process claim here, because the so-called "deception" did not cause respondent to either waive or forfeit his Fourteenth Amendment rights. See e.g. *Moran v. Burbine, id.*, 475 U.S. at 423-424, 106 S.Ct. at 1142 where this Court held:

"Granting that the deliberate or reckless withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."

Since respondent did not waive any of his Fourteenth Amendment rights as a result of the purported deception, the alleged wrongful conduct was not the cause of a violation of respondent's rights. Consequently, respondent cannot base his Fourteenth Amendment claim on conduct, regardless of whether it is wrongful, that is not the cause of a violation of his Fourteenth Amendment rights. See *Fried v. Hinson*, 78 F.3d 688, 691-692 (D.C. Cir. 1996) (By its terms, the due process clause does not apply unless an individual can show that the government action at issue deprives him of an actual interest in life, liberty or property). See also *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 105 S.Ct. 2427, 2436 (1985) (At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged).

Respondent also argues that petitioners were deliberately indifferent to his right to counsel his client. See Resp. Br. at pp. 42-44. The deliberate indifference standard is a subjective test and not an objective standard. See *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 1979 (1994). Thus, to establish deliberate indifference, government officials must know of and disregard an excessive risk of harm. See *Farmer v. Brennan, id.*, 511 U.S. at 837, 114 S.Ct. at 1979.

A review of the facts reveals that petitioners were not deliberately indifferent to respondent's Fourteenth Amendment right to practice his profession. For example, when the warrant was served

on respondent, he was not engaged in advising his client. (2 J.A. 434-435 and 3 J.A. 532-533). Once the warrant was served respondent did not ask that the search be delayed until after his client testified. (3 J.A. 541). Each of Traci Baker's requests to speak with respondent once her grand jury testimony had begun were granted. (3 J.A. 610-614). Each time Baker returned to the grand jury she asserted her Fifth Amendment rights and she never told Conn or Najera that she did not speak with respondent. (2 J.A. 236 and 241; 3 J.A. 610-614). When respondent was informed that his client needed to speak with him, he refused to talk with her. (2 J.A. 437-438).

The above facts demonstrate that petitioners did not know of, nor did they disregard, an excessive risk of harm to respondent's Fourteenth Amendment rights. Since Conn and Najera did not have subjective knowledge of the fact that Baker did not consult with respondent, and because petitioners were not presented with sufficient facts to draw such an inference, their conduct was neither conscience shocking nor deliberately indifferent.

Respondent also argues that Conn and Najera acted with deliberate indifference because there were less intrusive alternatives available to them. *See* Resp. Br. at pp. 44-45. This argument is untenable because the availability of alleged less intrusive alternatives is not part of the deliberate indifference standard. *See Farmer v. Brennan, id.*, 511 U.S. at 837, 114 S.Ct. at 1979. Furthermore, the likelihood of other alternatives constitutes, at most, negligence which is insufficient to establish a substantive due process violation.⁷ *See County of Sacramento v. Lewis, id.*, 118 S.Ct. at 1718 (Liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process); *see also Daniels v. Williams*, 474 U.S. 327, 333, 106 S.Ct. 662, 666 (1986).

Since the facts show that, at best, petitioners' conduct might have been negligent, the conduct of Conn and Najera was far

⁷ Petitioners' do not concede nor suggest in any manner that their conduct was somehow negligent.

below the level of conscience shocking or deliberately indifferent conduct.⁸

IV. RESPONDENT'S CHALLENGE TO THE VALIDITY OF THE WARRANT IS BEYOND THE SCOPE OF THE ORDER GRANTING CERTIORARI.

According to respondent's brief, he disputes that the warrant was validly obtained or executed by the special master. *See* Resp. Br. at p. 41. Any challenge respondent may have had to the validity of the warrant cannot be raised here and should not be considered by this Court, because the validity of the warrant and the reasonableness of its execution are Fourth Amendment issues that are far beyond the scope of the order of certiorari. (3 J.A. 696); *see also Matsushita Elec. Indus. Co. Ltd. v. Epstein*, 516 U.S. 367, 116 S.Ct. 873, 880 n.5 (1996) (Court declines to consider a question outside the scope of the question on which certiorari is granted).

The Ninth Circuit also rejected respondent's challenge to the validity of the warrant. (App. A to Pet. For Writ of Cert., at p.A-20). In addition, respondent's challenge to the execution of the warrant was denied by the Ninth Circuit because the special master was granted absolute quasi-judicial immunity. (App. A to Pet. For Writ of Cert., at p.A-24). Consequently, respondent's claims that there were material misstatements in the warrant application; that the warrant was impermissibly overbroad; or that the warrant was executed in an egregious manner have all been resolved against him.

The significance of the validity of the warrant lies in the fact that the government's conduct was reasonable here, because the

⁸ The district court held that Conn and Najera did not engage in conscience shocking conduct (1 J.A. 178-179) and respondent's brief to the court of appeal did not specifically address the issue of conscience shocking conduct. Therefore, respondent may have waived his claim that petitioners engaged in conscience shocking conduct. *See e.g. Officers for Justice v. Civil Service Comm.*, 979 F.2d 721, 726 (9th Cir. 1992), cert. denied 113 S.Ct. 1645 (1993) (failure to raise an issue on appeal results in waiver of that issue).

warrant and its execution were lawful under the Fourth Amendment. In other words, petitioners' alleged interference with respondent's right to practice his profession cannot be considered conscience shocking, deliberate indifference nor unreasonable, because the special master executed a lawful search warrant.

V. RESPONDENT DID NOT HAVE A CLEARLY ESTABLISHED FOURTEENTH AMENDMENT RIGHT THAT PREVENTED HIM FROM BEING SEARCHED AT THE TIME HIS CLIENT TESTIFIED BEFORE THE GRAND JURY.

According to this Court's order of certiorari, the second question before this Court is whether respondent had a clearly established right in March 1994, under the Fourteenth Amendment, not to be searched at the time his client was testifying before the grand jury. (3 J.A. 696). Since respondent's claim is based upon the substantive component of the due process clause there must be a violation of a fundamental liberty interest. *See Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 1447 (1993); *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 2267 (1997). The due process clause only protects those fundamental rights and liberties which are objectively and deeply rooted in our nation's history and tradition. *See Washington v. Glucksberg*, *id.*, 117 S.Ct. at 2268.

Although an attorney has a fundamental right to practice his profession,⁹ neither this Court nor any of the 12 federal circuit courts have held or suggested that an attorney has a fundamental liberty interest not to be subjected to a lawful search warrant at the time his client is testifying before the grand jury. Furthermore, there are no district courts that have held that at a grand jury proceeding an attorney cannot be searched while his client testifies. On the other hand, the federal case law does suggest that there is no fundamental right which prevents an attorney from being searched, pursuant to a valid warrant, at the time his client is

⁹ *See Schware v. Board of Bar Exam's of New Mexico*, 353 U.S. 232, 233-239, 77 S.Ct. 752, 756 (1957); *Greene v. McElroy*, 306 U.S. 474, 492, 79 S.Ct. 1400, 1411 (1959)

before the grand jury testifying. *See e.g. United States v. Mandujano*, 425 U.S. 564, 581, 96 S.Ct. 1768, 1779 (1976) (Witness before grand jury has no constitutional right to be represented by counsel and counsel may not be in grand jury room). Since respondent had no right to be present with his client when she testified before the grand jury, he certainly did not have a fundamental right that would preclude him from being subjected to a valid search warrant at the time his client testified before the grand jury.

According to respondent's brief, the petitioners had fair warning, as set forth in *United States v. Lainer*, 520 U.S. 259, 117 S.Ct. 1219 (1997), that subjecting him to a search at the time his client was testifying before the grand jury was unconstitutional under the Fourteenth Amendment. *See Resp. Br.* at pp. 45-46. The fair warning standard announced by this Court in *Lainer* is the same as the clearly established law standard articulated by this Court in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034 (1987). *See United States v. Lainer*, *id.*, 117 S.Ct. at 1227 (So conceived, the object of the clearly established immunity standard is not different from that of fair warning as it relates to law made specific for the purpose of validly applying section 242). The requirement that a right be clearly established guarantees that government officials have sufficient notice of the legal standards that govern their conduct. *See Davis v. Scherer*, 468 U.S. 183, 195, 104 S.Ct. 3012, 3019 (1984). Thus, in order to give adequate notice a court must identify the right infringed at a high level of particularity.¹⁰ *See Anderson v. Creighton*, *id.*, 483 U.S. at 639, 107 S.Ct. at 3038; *Jean v. Collins*, 155 F.3d 701, 708 (4th Cir. 1998).

Although *Anderson* does not require that a prior case have held identical conduct to be unlawful, government officials cannot be ambushed by newly invented theories of liability or by unforeseen applications of old ones. *See Jean v. Collins*, *id.*, 155 F.3d at 708; *see also Lassiter v. Alabama A & M Univ.* 28 F.3d

¹⁰ Since the right infringed must be identified at a high level of particularity, this Court should adopt the bright line standard for determining when the law is clearly established. *See e.g. Porterfield v. Lott*, 156 F.3d 563, 567 (4th Cir. 1998).

1146, 1150 (11th Cir. 1994) (En Banc) (For qualified immunity to be surrendered, preexisting law must dictate, that is, truly compel and not just suggest or allow or raise a question about the conclusion for every like-situated, reasonable government official that what the defendant is doing violates federal law under the circumstances). Here, the facts and circumstances confronting Conn and Najera were so unique that they could not have foreseen that their conduct was somehow in violation of substantive due process. See *Reno v. Flores*, *id.*, 507 U.S. at 303, 113 S.Ct. at 1447 (The mere novelty of a claim is reason enough to doubt that substantive due process sustains it).

Respondent contends that *Keker v. Procunier*, 398 F.Supp. 756 (E.D. Cal. 1975), provides clearly established law to support his claim that his Fourteenth Amendment rights were violated when he was searched at the same time his client was testifying before the grand jury. See Resp. Br. at p.49, n. 22. The *Keker* decision is insufficient to stake out the clearly established law applicable to the facts and circumstances Conn and Najera faced, because this Court has generally looked to its own case precedents or federal circuit court precedent, instead of district court decisions, as the relevant legal authority for determining whether the law is clearly established. See *e.g. Davis v. Scherer*, *id.*, 468 U.S. at 192, 104 S.Ct. at 3018; *Elder v. Holloway*, 510 U.S. 510, 513-516, 114 S.Ct. 1019, 1022-1023 (1994); *United States v. Lainer*, *id.*, 117 S.Ct. at 1226. Consequently, this Court should now adopt, as a general rule, that the relevant legal authority for deciding when the law is clearly established is either a decision(s) of this Court or of the 12 federal circuits, but not the numerous district courts. See *e.g. Jean v. Collins*, *id.*, 155 F.3d at 709 (Public officials cannot be expected to master the entire corpus of the case law in addition to fulfilling their public responsibilities).

Another reason why *Keker* cannot be used here as the measure of clearly established law is because the case arises in a prison context, whereas the case involving petitioners and respondent arises from a grand jury proceeding. In *Keker*, the attorneys were actively engaged in conferring with their clients when they had to meet with him in an uncomfortably hot interview room, were separated from him by a glass partition, had to communicate with him by telephone and were under continual surveillance by a

guard. In contrast, when respondent was served with the search warrant, he was not actively engaged in conferring with his client. (2 J.A. 434-435). Furthermore, when respondent's client was testifying before the grand jury he had no recognized right to confer with her at that time. See *United States v. Mandujano*, *id.*, 425 U.S. at 581, 96 S.Ct. at 1779. Since respondent was not actively engaged in advising or visiting with Traci Baker at the time she was testifying before the grand jury, and had no right to be with her inside the grand jury hearing room, the *Keker* case did not provide "fair warning" to either Conn or Najera that it would be a violation of respondent's Fourteenth Amendment rights to cause him to be searched at the time Baker was testifying before the grand jury.

A further reason why the *Keker* case did not make it apparent based upon the facts and circumstances faced by Conn and Najera, that subjecting respondent to a lawful search was unconstitutional under the Fourteenth Amendment, is because it gives inadequate guidance on whether the alleged constitutional infringement claimed by respondent was narrowly tailored to serve a compelling state interest. A fundamental liberty interest may be infringed when the infringement is narrowly tailored to serve a compelling state interest. See *Reno v. Flores*, *id.*, 507 U.S. at 302, 113 S.Ct. at 1447; *Washington v. Glucksberg*, *id.*, 117 S.Ct. 2268. Although it is petitioners' unequivocal position that they did not violate respondent's Fourteenth Amendment rights, if one *assumes* merely for the sake of argument, that respondent's Fourteenth Amendment rights were violated, there is still no clearly established law that the service of a warrant at the time the attorney's client is testifying before a grand jury does not serve a compelling state interest.

Here, the service of a warrant on respondent when Traci Baker was testifying before the grand jury did in fact serve a compelling state interest. Since the search warrant was related to a pending grand jury proceeding it served the compelling state interest of determining whether a crime, specifically, perjury, had been committed. See *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297, 111 S.Ct. 722, 726 (1991) (The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred).

In light of the fact that the search warrant served a compelling state interest, then even if one assumes that there was an infringement of respondent's Fourteenth Amendment rights, there was still no clearly established violation of the Fourteenth Amendment. See e.g. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, 107 S.Ct. 2400, 2404 (1987) (When a prison regulation impinges on an inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests, (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987))).

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in petitioners' brief on the merits, the Judgment of the United States Court of Appeals for the Ninth Circuit in favor of respondent on the Fourteenth Amendment claim should be reversed.

Dated: January 19, 1999

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DAVID CONN and CAROL NAJERA,

Petitioners,

vs.

PAUL L. GABBERT,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

**BRIEF *AMICUS CURIAE* OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

(1) Does a prosecutor violate an attorney's rights under the Fourteenth Amendment by causing the attorney to be searched at the time his client is testifying before a grand jury?

(2) If the answer to the first question is "yes," was such a right on the part of the attorney clearly established in March, 1994?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

DAVID CONN and CAROL NAJERA,
Petitioners,

vs.

PAUL L. GABBERT,
Respondent.

**BRIEF *AMICUS CURIAE* OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF PETITIONERS**

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)¹ is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society.

The people, as well as the defendant, need and deserve vigorous advocacy by their attorneys. While prosecutors must be accountable for abuse of their authority, excessive exposure

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

to litigation would have a chilling effect on their advocacy, to the detriment of the people's interest.

The decision of the Court of Appeals in this case exposes prosecutors to litigation of enormous breadth. A vague constitutional right of all attorneys to practice without "unreasonable" or "undue" interference and to the "highest standards" threatens to make constitutional issues out of routine interactions in the course of criminal cases. The resulting chill on the people's advocates would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The present case arises from the search of an attorney, the plaintiff in this case, who was representing a witness in a grand jury proceeding. Traci Baker had been a defense witness in the first trial of Lyle and Erik Menendez in Los Angeles. *Gabbert v. Conn*, 131 F. 3d 793, 797 (CA9 1997). Defendants David Conn and Carol Najera were prosecutors in that case. After the first trial ended in a hung jury, and before the retrial, Conn served Baker with a subpoena for a letter from Lyle Menendez, which Conn believed instructed Baker to testify falsely. The subpoena also required Baker to testify before the grand jury. *Ibid.* Baker informed a detective she had given the correspondence to Gabbert. *Ibid.*

The events on the day of the grand jury session indicate a considerable degree of confusion.

"Conn approached Gabbert and asked him if he had brought the 'documents' with him. Conn was referring to the Menendez correspondence, but Gabbert thought Conn was referring to Gabbert's motion to quash and accompanying documents.

"Based on Gabbert's response, Conn decided to obtain a warrant to search Gabbert and directed Detective Zoeller to secure it. Under California law, the search of an attorney or

law office must be conducted by a court-appointed special master. In this instance, Elliot Oppenheim ("Oppenheim"), a retired lawyer, was authorized to search Gabbert and his effects." *Id.*, at 798.

The search was conducted in a private room while Baker was testifying. Baker came out of the grand jury room to confer with Gabbert. Gabbert said he could not talk to Baker then. He apparently believed that further questioning of Baker could and would be delayed. See *ibid.* "Baker was able to see Gabbert and believed that they had communicated. She felt that he advised her to assert her Fifth Amendment rights." Pet. for Cert. 6. She then made that assertion, and the prosecutors believed she had in fact conferred with her attorney. *Ibid.*²

Following this search there was a second search, 131 F. 3d, at 798, but the issues arising from that search are not pertinent to the questions presented here.

Gabbert filed the present suit in federal court under 42 U. S. C. § 1983.³ The suit raised Fourth Amendment claims as to the validity of the warrant, the scope of the search, and the conducting of the second search. District Court Order of Sept. 27, 1994, App. to Pet. for Cert. B-10-B-12. His objections to the search interfering with communication with his client, however, were made under the Sixth Amendment and substantive due process, *id.*, at B-14-B-15, B-18-B-19, and not the Fourth Amendment.

The District Court dismissed all the claims against Conn and Najera except the due process claim. *Id.*, at B-21-B-22. Plaintiff moved to amend his complaint to add a pendent state-law claim under Cal. Penal Code § 1524. The District Court

2. This statement in the Petition for Certiorari is not denied in the Brief in Opposition. See Supreme Court Rule 15.2 (respondent who disputes statement of fact must say so in the Brief in Opposition).

3. Zoeller and Oppenheim were also defendants. The claims against them and the disposition of those claims are not pertinent here and are omitted from this summary.

denied leave to amend, exercising its discretion under 28 U. S. C. § 1367(c). The District Court found that the question of whether section 1524 provides a cause of action "is a novel question of state law." See Order Re: Leave to Amend, Feb. 8, 1995, App. to Pet. for Cert. C-4. The District Court subsequently granted summary judgment for Conn and Najera. App. to Pet. for Cert. E.

The Court of Appeals affirmed dismissal of the Fourth Amendment claim against Najera, but the court reversed as to the Fourth Amendment claim against Conn and the Fourteenth Amendment (*i.e.*, substantive due process) claim against both Conn and Najera. 131 F. 3d, at 806.

Conn and Najera petitioned for certiorari on the due process issues. See Pet. for Cert. i. On October 5, 1998, this Court granted certiorari limited to the questions stated *supra*, at i.

SUMMARY OF ARGUMENT

Notwithstanding the Court of Appeal's statement to the contrary, its holding in this case is anything but "narrow." Its expansion of the Due Process Clause to cover an isolated, nonrecurring "interference" with the practice of a profession opens up litigation of breathtaking scope. This step is contrary to this Court's cautious and restrained approach to due process claims, which has limited such claims in order to limit constitutional litigation to its proper scope and leave the large bulk of disputes to nonconstitutional rules and remedies.

Plaintiff's constitutional claim arises from a search, which he contends was conducted in an unreasonable manner. This is a Fourth Amendment claim. Under *Albright v. Oliver*, when a claim is covered by the Fourth Amendment, a due process claim does not lie.

The liberty interest claimed in this case, the right to practice a profession, does not rise to the constitutional level unless the action complained of operates to exclude the plaintiff from the

profession. An isolated, nonrecurring interference, such as the one in the present case, does not reach the constitutional threshold.

To overcome qualified immunity, the right in question must have been clearly established with some specificity. This is a question of law. Further, it must have been apparent at the time that the challenged action violated that right. This is a "mixed question" of law and fact. Neither requirement is met in this case.

ARGUMENT

I. The Ninth Circuit's holding in this case needlessly and excessively expands the scope of the Due Process Clause.

"Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U. S. 327, 332 (1986); see also *County of Sacramento v. Lewis*, 523 U. S. ___, 140 L. Ed. 2d 1045, 1059, 118 S. Ct. 1708, 1718 (1998). Once again, as in *Daniels*, *Lewis*, and other cases, this Court is asked to expand the Due Process Clause to cover matters already addressed by other rules of law. The invitation should, once again, be declined.

The Ninth Circuit in this case claimed that its holding was "narrow." *Gabbert v. Conn*, 131 F. 3d 793, 803 (CA9 1997). However narrowly the court may have stated its final holding, the reasoning leading to that holding opens the door to litigation of breathtaking scope. Along the way, the court held "that Gabbert had the clearly established right to practice law free from undue and unreasonable governmental interference." *Id.*, at 802.

The implications of this holding are staggering. If it stands, every action of government which adversely affects a lawyer's

ability to practice law will now be subject to the scrutiny of the federal courts to determine if it is "undue" or "unreasonable." This scrutiny will be layered on top of other mechanisms, including the state courts' control of practice before them, the state bar's disciplinary mechanism, civil litigation for damages or injunctive relief in state courts, and the accountability of elected prosecutors to the voters. Indeed, nothing in the reasoning of the Ninth Circuit limits this additional scrutiny to the practice of law. It could just as easily be applied to medicine, architecture, psychotherapy, or any other profession or occupation. Are the restrictions on a doctor referring patients to a lab in which he has an interest, see Cal. Bus. & Prof. Code § 650.01(a), "undue" or "unreasonable"? This would be a question of federal constitutional law under the Ninth Circuit's broadly worded principle. It might be an easy question, but it ought not be a federal question at all, and it most certainly ought not be a constitutional question.

The question presented by this case depends on what it means to "deprive any person of . . . liberty . . . without due process of law . . ." U. S. Const., Amdt. 14, § 1. Due process claims fall into three categories. In a procedural due process case, the state's action would be legal and justified by the facts it has alleged, but the procedure for determining the facts is claimed to be inadequate. In a substantive due process challenge to legislative action, the challenge is made against the rule that establishes the legal consequences of the facts. In these cases, the executive officers are alleged to be violating the Constitution even though their actions are proper, or even mandatory, under statutory law. We will refer to this type of case as "substantive/legislative." The third variety is the substantive due process challenge to the executive action itself. In these cases, the executive action is typically not authorized by state law, and may even violate a statute or common law duty, but the plaintiff alleges that the action also violates the

Constitution. We will refer to this type of case as "substantive/executive."⁴

"[T]he first step [in adjudicating a § 1983 claim] is to identify the exact contours of the underlying right said to have been violated." *County of Sacramento v. Lewis*, *supra*, 140 L. Ed. 2d, at 1054, n. 5, 118 S. Ct., at 1714, n. 5. This step necessarily entails classifying the contention as procedural, substantive/legislative, or substantive/executive. The criteria for evaluation of the contention differ, depending on that classification. *Id.*, at 1057, 118 S. Ct., at 1716.

Procedural due process claims typically involve the least infringement upon the separation of powers or the people's right to govern themselves through the democratic process.⁵ Where a protected liberty interest is found, the burden on the state generally amounts to merely notice and an opportunity to be heard. See, e.g., *Hewitt v. Helms*, 459 U. S. 460, 477 (1983), disapproved in part on other grounds, *Sandin v. Conner*, 515 U. S. 472, 483 (1995).

Challenges to the substance of legislation under the Fifth and Fourteenth Amendment Due Process Clauses have involved the most controversial issues and cases, from *Dred Scott v. Sandford*, 19 How. (60 U. S.) 393 (1857) to *Roe v. Wade*, 410 U. S. 113 (1973) to *Washington v. Glucksberg*, 521 U. S. ___, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997). The interference with legislative authority and democratic self-government

4. "Executive" is a convenient shorthand, because almost all cases of this type involve executive branch officers. There are, of course, a few cases of officials of other branches committing these types of violations. See, e.g., *United States v. Lanier*, 520 U. S. 259, 261 (1997) (judge committed sexual assaults in chambers).

5. We say "typically" because there are a few cases where courts have been asked to regulate the procedure of a core function of another branch of government. See *Ohio Adult Parole Auth. v. Woodard*, 523 U. S. ___, 140 L. Ed. 2d 387, 398-399, 118 S. Ct. 1244, 1251-1252 (1998) (executive clemency); *Nixon v. United States*, 506 U. S. 224, 228 (1993) (impeachment). These cases do raise major separation-of-powers issues.

requires that this kind of review be carefully limited to "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition . . ." *Glucksberg*, 138 L. Ed. 2d, at 787, 117 S. Ct., at 2268 (citation and internal quotation marks omitted).

Substantive due process challenges to executive action involve claims that the action was " 'arbitrary in the constitutional sense.' " *Lewis*, 140 L. Ed. 2d, at 1057, 117 S. Ct., at 1716 (quoting *Collins v. Harker Heights*, 503 U. S. 115, 129 (1992)). "Constitutional sense" means that this kind of claim is reserved for "only the most egregious official conduct." *Ibid.* The purpose here is "to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law." *Id.*, at 1058, n. 8, 117 S. Ct., at 1717, n. 8.

In the present case, the State of California has established, by statute, a "predeprivation" procedure. The procedure for the search of an attorney who is not a suspect is set forth in Cal. Penal Code § 1524(c), (d), and (e). Nothing in the opinion of the Ninth Circuit is based on any claimed inadequacy of this procedure. Hence, this is not a "procedural due process" case. Also, nothing in that opinion is based on any claim of unconstitutionality of a statutory rule of substantive law. Hence, this is not a substantive/legislative due process case.

That leaves the substantive/executive variety of due process claims. The essence of the claim is that, although the search itself was legal and supported by probable cause, the timing and manner of the search violated a "liberty interest" within the protection of the Due Process Clause. The Ninth Circuit panel concluded that "[t]he only apparent reason to have both [the search and the client's grand jury testimony] occur at the same time was the prosecutors' desire to prevent Gabbert from communicating with his client." *Gabbert, supra*, 131 F. 3d, at 802. In California, as in most states, misuse of legal process "for a purpose other than that for which the process is designed" is the common-law tort of abuse of process. 5 B. Witkin,

Summary of California Law §459, p. 547 (9th ed. 1988) (emphasis omitted). The question in this case, as in *Lewis, Collins v. Harker Heights, Albright v. Oliver*, 510 U. S. 266 (1994), and other cases, is whether to make a federal constitutional issue out of a tort case.

The Fourteenth Amendment and its implementing legislation, including 42 U. S. C. § 1983, provide important protections for individual rights. The protection of such rights cannot be left entirely to the states "because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe v. Pape*, 365 U. S. 167, 180 (1961), overruled in part on other grounds, *Monell v. New York City Dept. of Soc. Serv.*, 436 U. S. 658, 663 (1978). Along with benefits, though, this kind of litigation entails substantial costs.

"By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Glucksberg, supra*, 138 L. Ed. 2d, at 787, 117 S. Ct., at 2267-2268. This effect is most severe in the substantive/legislative cases, but it is also present in the substantive/executive cases.

Compensation of persons who have been wronged is an essential part of our system of civil justice, but that system involves many trade-offs and policy judgments. Tort litigation is a burden on society, and we must decide how much of our resources we can afford to devote to it. Even where an act is admittedly wrongful and compensable, there are issues of the extent of compensation, availability of punitive damages, the allowability and amount of attorney's fees, and whether to provide an administrative remedy and require that it be invoked before turning to the courts, to name only a few. If the interest in question is constitutionalized, and thus made subject to a section 1983 action, the state deliberative process is short-circuited and the people lose control of these decisions.

Broad language in some early cases threatened to make the Due Process Clause into an all-encompassing code of government torts. The Ninth Circuit in the present case relied on *Greene v. McElroy*, 360 U. S. 474, 492 (1959) for its basic proposition of a constitutional right to practice free of unreasonable governmental interference. *Gabbert, supra*, 131 F. 3d, at 800. More recent cases, recognizing the danger, have cut back the scope of due process claims in several ways.

First, due process claims have been held to be precluded when another constitutional provision establishes the standard for the conduct in question. This issue is addressed in part II, *infra*.

Second, procedural due process claims, at least, are precluded when predeprivation process is impractical and the state provides postdeprivation process. In light of the limited grant of certiorari in this case, we will not brief the point that this rule should extend to substantive due process claims as well. It is discussed in our brief in *County of Sacramento v. Lewis*, No. 96-1337.⁶

Third, the potentially unlimited scope of "liberty interests" has been cut back by a number of cases holding that the interests asserted did not rise to the threshold of constitutional protection. See, e.g., *Cafeteria Workers v. McElroy*, 367 U. S. 886, 895-896 (1961) (loss of security badge and single job); *Board of Regents v. Roth*, 408 U. S. 564, 575 (1972) (nonrenewal for job); *Paul v. Davis*, 424 U. S. 693, 709 (1976) (reputation alone is not constitutionally protected liberty interest).

As we will discuss further in part III, *infra*, the constitutional threshold for interference with a profession or occupation has, after some initial uncertainty, largely settled at complete exclusion from the field.

6. This would not be an appropriate case for further exploration of this point, even with a broader grant of certiorari, as the existence and scope of postdeprivation state process is an unresolved question of state law. See *supra*, at 4.

II. Because any claim plaintiff may have is covered by the Fourth Amendment, his due process claim is precluded under *Albright v. Oliver*.

Albright v. Oliver, 510 U. S. 266 (1994) is strongly analogous to the present case. In that case, as in this one, this Court was asked "to break new ground" in substantive due process. *Id.*, at 281 (Ginsburg, J., concurring). The Court declined to do so, with a majority basing that decision on the conclusion that Albright's claim was covered by the Fourth Amendment. *Id.*, at 273-274 (plurality); *id.*, at 289 (Souter, J., concurring in the judgment) (no substantial injury to plaintiff not attributable to the seizure).

Comparing *Albright* with the present case, we see that Gabbert's claim falls more squarely within the Fourth Amendment realm than Albright's did. In *Albright*, plaintiff was subjected to both a seizure, *i.e.*, arrest followed by release on bail with restrictions, and an ensuing prosecution. *Id.*, at 268-269. His claim of injury from the prosecution itself was sufficient to convince four Justices that a separate due process analysis was required. See *id.*, at 281 (Kennedy, J., concurring in the judgment); *id.*, at 307 (Stevens, J., dissenting). In the present case, there is no further action after the search that even arguably caused injury to the plaintiff.

The Fourth Amendment is not limited to questions of *whether* the government may search and seize; it also includes questions of *how* the government may search and seize. Indeed, *Graham v. Connor*, 490 U. S. 386 (1989), the *Albright* plurality's main precedent, was an "excessive force" case. *Id.*, at 390. The issue was not the fact of Connor's investigatory stop of Graham, but rather the amount of force used to effect it. Similarly, in *Wilson v. Arkansas*, 514 U. S. 927, 929 (1995) the police had a valid warrant supported by probable cause and thus were authorized to enter and search the home. The issue was the manner of execution of the warrant, specifically "that the officers had failed to 'knock and announce' before entering [defendant's] home." *Id.*, at 930. The Court held that "the

reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering." *Id.*, at 931.

The essence of Gabbert's claim is the time of the search. See *Gabbert v. Conn*, 131 F. 3d 793, 802 (CA9 1997). A complaint about the time is similar to a complaint about the manner.⁷ The challenge goes not to the fact or extent of the search but the way in which it was conducted. The injury is not the invasion of privacy that inevitably comes from a search but rather some collateral damage that could have been avoided. As in *Graham* and *Wilson*, this kind of complaint goes to Fourth Amendment reasonableness.

Because *Albright* has no majority opinion, its "holding . . . may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds" *Marks v. United States*, 430 U. S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U. S. 153, 169, n. 15 (1976) (lead opinion)). "This test is more easily stated than applied" to some cases, *Nichols v. United States*, 511 U. S. 738, 745 (1994), because it is not always apparent which opinion is "narrowest." *Albright* fits that description. The difficulties of *Marks* need not be resolved here, though, because the present case fits squarely within the positions of *all* of the opinions concurring in the judgment in *Albright*.

We begin with the plurality. From the fact that *Albright*'s claim fell within the compass of the Fourth Amendment, 510 U. S., at 274, the plurality "hold[s] that substantive due process

7. The triad "time, place, and manner" is, of course, a familiar one in First Amendment law. See, e.g., *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989). The phrase appears in the text of the Constitution where it authorizes some state regulation of federal elections. U. S. Const., Art. I, § 4.

. . . can afford him no relief." *Id.*, at 275. This holding is "on all fours" with the present case.⁸

Justice Kennedy's opinion agrees with the basic rule as stated by the plurality, but disagrees with its application to the facts of *Albright*. *Id.*, at 281. The facts of the present case, though, are not subject to this disagreement. Unlike *Albright*, there is no further action beyond the search or seizure, and hence the present case comes within the rule as applied in Justice Kennedy's opinion.

Justice Souter would hold that a due process claim fails if the injury results from a seizure, and the plaintiff fails to allege any substantial injury attributable to some act other than the seizure. *Id.*, at 289 (opinion concurring in the judgment). The same principle would logically apply to a search. As there is no injury in this case from anything other than the search, a due process claim is precluded under Justice Souter's rule.

Albright v. Oliver is squarely on point and dictates the outcome of this case. Whatever complaint plaintiff Gabbert has about the timing of the search must be made under the Fourth Amendment, and not the "treacherous" field of substantive due process. See *id.*, at 281 (Ginsburg, J., concurring) (quoting *Moore v. East Cleveland*, 431 U. S. 494, 502 (1977) (opinion of Powell, J.)).

III. The "liberty interest" in an occupation only rises to constitutional magnitude when a person is completely excluded from the field.

The "liberty interest" supposedly violated in this case is "an individual's right to practice a profession free from undue and unreasonable state interference" *Gabbert v. Conn*, 131

8. The opinions of Justice Scalia and Justice Ginsburg need not be analyzed under *Marks*, since they join the plurality, but both opinions state rules that would preclude the due process claim in the present case. See *id.*, at 275 (Scalia, J., concurring); *id.*, at 281 (Ginsburg, J., concurring).

F. 3d 793, 800-801 (CA9 1997). The conclusion that this is a constitutionally protected interest comes from a statement in *Greene v. McElroy*, 360 U. S. 474, 492 (1959), that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment, [citation]"

This sweeping statement is problematic in two respects. First, it is bald dictum, completely unnecessary to the holding of the case. The *Greene* Court was merely summarizing the argument of respondent at this point. The case was decided on narrower, nonconstitutional grounds. *Id.*, at 493, 508; *id.*, at 509 (Harlan, J., concurring in the judgment). Second, the statement purports to state established law, but nothing close to its breadth is supported by the cases it cites. As Justice Clark noted in dissent, the majority

"cites four cases in support of the proposition and says compare four others. As I read those cases not one is in point.⁴ In fact, I cannot find a single case in support of the Court's position.

⁴ *Dent v. West Virginia*, 129 U. S. 114 (1889), held that a West Virginia statute did not deprive one previously practicing medicine of his rights without due process by requiring him to obtain a license under the Act. *Schware v. Board of Bar Examiners*, 353 U. S. 232 (1957), likewise a license case, did not pass upon the 'right' or 'privilege' to practice law, merely holding that on the facts the refusal to permit Schware to take the examination was 'invidiously discriminatory.' In *Peters v. Hobby*, 349 U. S. 331 (1955), the Court simply held the action taken violated the Executive Order involved. The concurring opinion, DOUGLAS, J., p. 350, went further but alone on the question of 'right.' The Court did not discuss that question, much less pass upon it. *Slochower v. Board of Education*, 350 U. S. 551 (1956), held that the summary dismissal without further

evidence by New York of a school teacher because he had pleaded the Fifth Amendment before a United States Senate Committee violated due process. The case merely touched on the 'right' to plead the Fifth Amendment, not to 'property' rights. *Truax v. Raich*, 239 U. S. 33 (1915); *Allgeyer v. Louisiana*, 165 U. S. 578 (1897); and *Powell v. Pennsylvania*, 127 U. S. 678 (1888), were equal protection cases wherein discrimination was claimed. *Greene* alleges no discrimination." *Id.*, at 512-513.

The Court did not take long to back off from *Greene*'s sweeping dictum. *Cafeteria Workers v. McElroy*, 367 U. S. 886 (1961) involved the revocation of a security badge needed for employment at a particular installation. *Id.*, at 887-888. The Court first decided that the commander's action was authorized, distinguishing *Greene*. *Id.*, at 889-894. The constitutional issue was then presented.

"What, then, was the private interest affected by Admiral Tyree's action in the present case? It most assuredly was not the right to follow a chosen trade or profession. Cf. *Dent v. West Virginia*, 129 U. S. 114; *Schware v. Board of Bar Examiners*, 353 U. S. 232; *Truax v. Raich*, 239 U. S. 33. Rachel Brawner [the employee] remained entirely free to obtain employment as a short-order cook or to get any other job, either with M & M or with any other employer. All that was denied her was the opportunity to work at one isolated and specific military installation." *Id.*, at 895-896.

While the sweeping dictum of *Greene* is not mentioned by name, this passage cites the same cases as *Greene* and says the right they recognize is *not* implicated. *Greene* was an aeronautical engineer at a time when defense work permeated the aeronautics industry. See *Greene*, 360 U. S., at 491, n. 21. Hence, the revocation of his security clearance amounted *de facto* to a complete exclusion from his field. *Id.*, at 475-476, 492. Brawner, the real party in interest in *Cafeteria Workers*, was only precluded from one job and could still seek employment in the vast majority of positions in her field. *Cafeteria*

Workers thus sharply narrowed the *Greene* dictum from interference with a trade or profession down to exclusion from a trade or profession.

The distinction between interference and preclusion was reaffirmed in *Board of Regents v. Roth*, 408 U. S. 564 (1972). Roth, a nontenured college professor, was not rehired for the following academic year. *Id.*, at 566. Beyond question, being fired is a far greater "interference" with one's occupation than the isolated, one-time action in the present case. Yet *Roth* held that discharge did not deprive Roth of "liberty" within the meaning of the Due Process Clause. The Court noted that the state action did not "foreclose[] his freedom to take advantage of other employment opportunities." *Id.*, at 573. The Court distinguished *Schwartz v. Board of Bar Examiners*, 353 U. S. 232, 238 (1957), a case of complete exclusion from a profession. Citing the passage of *Cafeteria Workers* quoted above, *Roth* concluded, "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." 408 U. S., at 575.

The Ninth Circuit has repeatedly recognized complete exclusion from the field as the threshold of a constitutional liberty interest in cases of employment and business. In *Dorfmont v. Brown*, 913 F. 2d 1399, 1404 (CA9 1990), the Ninth Circuit rejected a due process attack on the revocation of a security clearance. The court noted that Dorfmont was not excluded from all jobs, but only some of them. *Id.*, at 1403. Loss of a security clearance is a major occupational blow to anyone working in the defense industry, but because it did not rise to level of complete exclusion, it did not amount to deprivation of a cognizable liberty interest. To the same effect is *Erickson v. Pierce County*, 960 F. 2d 801 (CA9 1992), a case of discharge plus damage to reputation. *Id.*, at 802-803. "Since Erickson was free to continue in her career elsewhere as an administrative secretary, and since she was not stigmatized to the point where she could not find work, the district court properly dismissed her due process claim." *Id.*, at 806. In

Wedges/Ledges of Calif. v. City of Phoenix, 24 F. 3d 56, 65 (CA9 1994), the court found no liberty interest involved when a city prohibited one aspect of plaintiffs' business but did not prevent them from pursuing the occupation altogether. In *Portman v. County of Santa Clara*, 995 F. 2d 898, 908 (CA9 1993), a due process claim by a fired government attorney was rejected with the observation he had not been excluded from the practice of law and did, in fact, find other employment as an attorney.

Other circuits recognize the same distinction. *Setliff v. Memorial Hosp. of Sheridan County*, 850 F. 2d 1384 (CA10 1988) held, " 'A liberty interest is not implicated where the charges merely result in reduced economic returns and diminished prestige, but not permanent exclusion from or protracted interruption of employment.' " *Id.*, at 1397 (emphasis added) (quoting *Munson v. Friske*, 754 F. 2d 683, 693 (CA7 1985)). See also *Joelson v. United States*, 86 F. 3d 1413, 1420 (CA6 1996) ("effectively forecloses," citing *Roth*); *Bernard v. United Township High Sch. Dist. No. 30*, 5 F. 3d 1090, 1092 (CA7 1993) (exclusion from "one particular job" not actionable as violation of liberty interest in following a chosen occupation); *Piecknick v. Pennsylvania*, 36 F. 3d 1250, 1259 (CA3 1994) (following *Bernard*); *O'Donnell v. Barry*, 148 F. 3d 1126, 1141-1142 (CA DC 1998) (job action that set back plaintiff in his career, but did not destroy it, insufficient to implicate constitutional liberty interest).

There are a few cases involving simultaneous discharge and defamation that muddy the waters somewhat. *Paul v. Davis*, 424 U. S. 693, 709, 712 (1976) held that defamation alone does not implicate a liberty interest. Defamation of a fired employee also does not, if it is not "uttered incident to the termination" *Siebert v. Gilley*, 500 U. S. 226, 234 (1991). However, a footnote in *Owen v. City of Independence*, 445 U. S. 622, 633-634, n. 13 (1980) finds a liberty interest implicated in a discharge plus defamation case, with no indication that the magnitude of the stigma completely precluded employment in the field. The question of whether two interests can add up to

a constitutional "liberty interest" when neither does alone need not be confronted in the present case, however, since the question before the Court is whether interference with practice of a profession alone rises to that level.

The complete exclusion standard provides a clear, workable line to separate egregious cases warranting constitutional protection from the vast ocean of real and imagined injuries that may warrant adjudication but do not rise to the constitutional level. A lesser standard would threaten to make federal civil rights litigation a forum for second-guessing every government decision from employee firings, such as *Roth, supra*, to tow-truck contracting, such as *Piecknick, supra*. The Constitution and the civil rights laws should not be "demoted," see *supra*, at 8, and diluted in that manner. Interferences with occupations that do not amount to exclusion from the field can and should be left to state law.

IV. At the time of defendants' actions, it was not "apparent" that the actions violated any "clearly established" due process right.

To decide a legal question, a court must perform "three distinct functions: law declaration, fact identification, and law application." See Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 234 (1985). That is, a court must decide what rule of law applies to the case, find the facts relevant to the rule, and apply the facts to the rule to reach the conclusion. Stated another way, courts decide questions of law, questions of fact, and "mixed questions."⁹

The qualified immunity cases implicitly recognize that executive officers must go through the same process in deciding

whether to take an action that would arguably violate someone's rights. That is, they must decide whether the purported right exists, determine the relevant facts, and decide whether the contemplated action would violate the right. To stay within the umbrella of qualified immunity, officials must be reasonable, not necessarily correct in hindsight, at each step.

As to the facts, *Anderson v. Creighton*, 483 U. S. 635, 641 (1987) makes clear that the officers' actions are judged by the information they possessed at the time of the challenged act. Facts discovered later may well negate the legal basis for action, e.g., refute probable cause for a search, but will not defeat immunity.

The controlling rule of law must be identified with some degree of specificity. The broad, abstract phrases of the Constitution itself, such as "due process of law" or "unreasonable searches and seizures" are not sufficient as "clearly established" rules to achieve the policy objectives of the immunity doctrine. "Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.*, at 639. The policy is to preserve the remedy in the most egregious cases, while protecting society from the social costs of excessive litigation against officials.

"These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow v. Fitzgerald*, 457 U. S. 800, 814 (1982).

At the law declaration stage, the *Anderson* requirement of specificity is largely the same as the requirement in habeas corpus that the rule asserted was dictated by precedent existing when the state decision became final. See *Sawyer v. Smith*, 497 U. S. 227, 236 (1990) (quoting *Anderson*). For example, in

9. These categories are typically distinguished in discussions of the standard of review on appeal or habeas corpus. See Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 Colum. L. Rev. 888, 903-906 (1998).

Davis v. Scherer, 468 U. S. 183 (1984) a fired government employee claimed that an informal opportunity to be heard, which he had received, and a posttermination evidentiary hearing, which state law provided, were insufficient for procedural due process. He also claimed a right to either a formal pretermination hearing or a *prompt* posttermination hearing. *Id.*, at 187. While the general rule of due process was clearly established, the specific rule the plaintiff claimed was not, and the defendant was covered by qualified immunity. *Id.*, at 191-193.

Specificity of the controlling rule only goes so far, though. Some rules, by their nature, defy crystallization into specific subrules. "Probable cause" is one such rule. *Illinois v. Gates*, 462 U. S. 213, 232 (1983). Sufficiency of the evidence is another. *Wright v. West*, 505 U. S. 277, 308-309 (1992) (Kennedy, J., concurring in the judgment). Qualified immunity extends beyond declaration of the controlling rule into application of the rule to the facts. In a "probable cause" case, the searching officers are immune if they "reasonably but mistakenly conclude that probable cause is present . . ." *Anderson*, 483 U. S., at 641; see *Hunter v. Bryant*, 502 U. S. 224, 228-229 (1991) (*per curiam*). Probable cause is a mixed question of law and fact. *Ornelas v. United States*, 517 U. S. 690, 696-697 (1996).¹⁰

Finally, the rule of qualified immunity is right-specific. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates *that* right." *Anderson*, 483 U. S., at 640 (emphasis added). Violation of some other rule of law does not defeat immunity. *Davis, supra*, 468 U. S., at 194 and n. 12.

10. At this point, the law of qualified immunity diverges from pre-AEDPA habeas law. See, e.g., *Thompson v. Keohane*, 516 U. S. 99, 110 (1995) (*de novo* determination of mixed questions). Congress has now acted to limit *de novo* relitigation of mixed questions. See Scheidegger, *supra*, 98 Colum. L. Rev., at 948-953.

In the present case, plaintiff's due process claim is precluded by qualified immunity. The right to practice a profession without reasonable interference is far too general to pass muster as the controlling rule under *Anderson*. As we survey the legal landscape¹¹ in search of a more specific rule, we find the many cases cited in part III, *supra*, holding that a single "interference" with an occupation does not rise to the level of a constitutional deprivation. While a court might hold, on a plenary consideration of the matter, that those cases are somehow distinguishable, the contrary view is also entirely plausible.

Even if a clearly established rule of adequate specificity could be found here, the question would remain whether it was *apparent* that Conn and Najera's actions violated that rule, based on the facts known to them at the time. The more generally the rule is stated, the greater the difficulty in finding a violation "apparent." Even very general rules can be obviously violated by highly egregious conduct, and this is so even when there are no precedents. See *United States v. Lanier*, 520 U. S. 259, 271 (1997) (noting that "selling foster children into slavery" would clearly violate the law despite the lack of a precedent).

The further we get from egregious misconduct and the closer we get to actions that may be considered valid, vigorous performance of public duty, the more important the specificity of the rule becomes. The rule that a warrant is required to enter a person's home to arrest him, see *Payton v. New York*, 445 U. S. 573, 590 (1980), for example, is a "bright line" rule for which violations will generally be "apparent." At the other end of the spectrum is "probable cause," where the lack of specific rules would require an aggravated case to conclude that the officers had been unreasonable in their belief probable cause was present. See, e.g., *Hunter v. Bryant, supra*, 502 U. S., at

11. This phrase is borrowed from the *Teague* line of cases. See *Graham v. Collins*, 506 U. S. 461, 468 (1993).

228-229 (finding immunity on thin evidence); cf. *id.*, at 234 (Stevens, J., dissenting).

If the Ninth Circuit's broad rule of liberty to pursue an occupation free of unreasonable or undue interference is accepted as the controlling rule, it would take a truly egregious act before a violation was "apparent." Whether a challenged action is reasonable or unreasonable in its context is such an inherently nebulous question that it will generally be debatable. If the underlying question is debatable, the immunity debate is over.

In the present case, the prosecutors engaged in some "hardball" tactics, to be sure. Yet they believed that a witness was attempting to conceal relevant evidence in the prosecution of an exceptionally heinous double murder. They had reason to believe that the timing of the search did not, in fact, prevent Gabbert from advising his client. See *supra*, at 3. Whether their actions were reasonable is debatable. That they could reasonably have believed they were reasonable is clear.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

November, 1998

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

DAVID CONN and CAROL NAJERA,
Petitioners,

v.

PAUL L. GABBERT,
Respondent.

*On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS AND CALIFORNIA ATTORNEYS
FOR CRIMINAL JUSTICE AS *AMICI CURIAE* IN SUPPORT
OF RESPONDENT

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS AND CALIFORNIA ATTORNEYS
FOR CRIMINAL JUSTICE AS *AMICI CURIAE* IN SUPPORT
OF RESPONDENT

This *amicus curiae* brief is submitted in support of the position of the Respondent Paul L. Gabbert. Written consents of the parties to the filing of this brief have been contemporaneously submitted to the Clerk of the Court.^{1/}

^{1/} As required by Rule 37.6 of this Court, *amici curiae* submit the following statement: no party authored this brief in whole or in part; and no person or entity, other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit organization whose membership is comprised of over 10,000 lawyers and 28,000 affiliate members representing every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts.

The NACDL is the only national bar organization working on behalf of public and private criminal defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

The NACDL submits this brief because it regards this case as part of a pattern of interference with the efforts of criminal defense attorneys to represent their clients zealously at all stages of the criminal process. Through a variety of means, including searches of attorneys and their offices, electronic surveillance of confidential attorney-client communications, violation of ethical rules that prohibit contact with represented parties, forfeiture of attorney fees, and abuse of the grand jury process, some prosecutors have sought to impede defense counsel in the performance of their duties. The NACDL has strong concern about this pattern of prosecutorial conduct.

California Attorneys for Criminal Justice (CACJ) is the largest single state affiliate of the NACDL. CACJ is a nonprofit California corporation. CACJ was formed to achieve certain objectives, including "to protect and insure by rule of law those individual rights guaranteed by the California and Federal Constitutions, and to resist all efforts made to curtail such

rights." In addition, the organization has as a purpose to engage in activities that will advance and promote "justice and the common good of the citizens of the United States." Bylaws of CACJ, Art. IV, ¶¶ A, C. CACJ is administered by a Board of Governors, made up of criminal defense lawyers practicing within the state of California. The organization has approximately 2400 dues-paying members, who are primarily criminal defense lawyers practicing before state and federal courts. These lawyers are employed both in the public and private sectors, and are distributed around the state.

Given the breadth of the issues presented in this case, CACJ appears here to urge the Court to uphold the ruling of the court of appeals on the basis that it reaches a narrow issue and justly demonstrates concern that in the unusual case, prosecutors and law enforcement officers may be held accountable for taking action that threatens the integrity and independence of the criminal defense bar and the constitutional rights of those who depend on members of the bar for the protection of their rights.

Paul L. Gabbert, the plaintiff below and the respondent here, is an attorney member of both NACDL and CACJ, and he has served on the board of directors of the latter organization.

SUMMARY OF ARGUMENT

Prosecutors Conn and Najera deliberately timed the search of attorney Gabbert's person and briefcase to prevent him from consulting with his client, Traci Baker, as she testified before the grand jury. Each aspect of the prosecutors' alleged misconduct--the search of Gabbert and the questioning of Baker when she lacked access to her counsel--raises grave concerns. But the specific misconduct at issue here cannot be viewed in isolation; the search of Gabbert while his client appeared before

the grand jury forms part of a broader pattern of prosecutorial tactics designed to interfere with the efforts of criminal defense attorneys to represent their clients zealously. Left unchecked, these tactics threaten to skew the adversarial system unfairly in the government's favor. Although this case ultimately may turn on the concepts of "liberty" and "property" under the Due Process Clause, we urge the Court to consider the potentially far-reaching consequences of its decision for the defense bar.

ARGUMENT

I. THIS CASE MUST BE VIEWED AGAINST A BACKDROP OF PROSECUTORIAL EFFORTS TO INVADE THE RELATIONSHIP BETWEEN CRIMINAL DEFENSE ATTORNEYS AND THEIR CLIENTS.

The peculiar facts of this case may tempt the Court to view it as an isolated instance of prosecutorial misconduct. Petitioners advocate precisely this perspective in analyzing the Fourteenth Amendment implications of their conduct. *Amici* disagree with this narrow approach. We believe that the specific prosecutorial misconduct at issue here must be viewed against the backdrop of a broader pattern of prosecutorial tactics intended to deter criminal defense attorneys from representing their clients zealously.

Over the past two decades, commentators have noted the increased use of investigative techniques aimed at defense attorneys. These tactics include, for example, searches of attorneys and their offices, electronic surveillance of confidential attorney-client communications, subpoenas to attorneys for information concerning their clients, use of informants at defense meetings, and contacts with represented persons without notifying their counsel. *See, e.g.,* William J. Genego, *The New*

Adversary, 54 Brooklyn L. Rev. 781 (1988); Ronald Goldstock & Steven Chananie, "Criminal" Lawyers: The Use of Electronic Surveillance and Search Warrants in the Investigation and Prosecution of Attorneys Suspected of Criminal Wrongdoing, 136 U. Pa. L. Rev. 1855 (1988); *Symposium on Prosecutorial Ethics*, 53 U. Pitt. L. Rev. 271 (1992).²¹ Although these tactics may be justified under some circumstances, their increasing use impedes defense counsel in performing the function that the Constitution assigns them.

In light of prosecutors' increased willingness to resort to these investigative techniques, petitioners' deliberate use of a search warrant to interfere with attorney Gabbert's representation of his client before the grand jury cannot be regarded merely as, to use petitioners' phrase, "a necessary interruption or delay of a person's activities." Petitioners' Brief on the Merits ("Pet. Br.") at 9. Petitioners' conduct amounted

²¹ The *Pittsburgh Post-Gazette* recently published a series of articles detailing improper prosecutorial practices. *See, e.g.,* Bill Moushey, *Out of Control; Legal Rules Have Changed, Allowing Federal Agents, Prosecutors to Bypass Basic Rights*, *Pittsburgh Post-Gazette*, Nov. 22, 1998, at A-1; Bill Moushey, *Hiding the Facts; Discovery Violations Have Made Evidence-Gathering a Shell Game*, *Pittsburgh Post-Gazette*, Nov. 24, 1998, at A-1; Bill Moushey, *The Damage of Lies; Zeal for Convictions Leads Government to Accept Tainted Tips, Testimony*, *Pittsburgh Post-Gazette*, Nov. 29, 1998, at A-1; Bill Moushey, *When Safeguards Fail; Grand Juries Make Questionable Calls When Prosecutors Hide the Evidence*, *Pittsburgh Post-Gazette*, Dec. 6, 1998, at A-1; Bill Moushey, *Wrath of Vengeance; Prosecutors Take Aim at Defense Attorneys*, *Pittsburgh Post-Gazette*, Dec. 8, 1998, at A-1; Bill Moushey, *Failing to Police Their Own; Justice's Oversight Office Called Ineffective, Unresponsive*, *Pittsburgh Post-Gazette*, Dec. 13, 1998, at A-1.

to a calculated encroachment on the ability of a criminal defense attorney to advise his client. That conduct not only hindered Gabbert's communication with Ms. Baker as she appeared before the grand jury; combined with other improper prosecutorial tactics, it sends a clear message to all defense counsel that zealous representation may subject both the client and the lawyer to government abuse. Unless condemned by the courts, that message will erode the ability of defense counsel to confront the prosecution fearlessly on behalf of their clients.

II. THE DANGERS POSED BY THE SEARCH OF ATTORNEY GABBERT AND HIS EFFECTS.

Only a few months ago, this Court emphasized the importance of the attorney-client privilege in fostering frank communication between attorney and client. *See Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998). Searches of attorneys and their effects present significant dangers to the confidentiality that the privilege protects. The increasing incidence of such searches has spawned judicial decisions,^{3/}

^{3/} *See, e.g., United States v. Mittelman*, 999 F.2d 440, 444-45 (9th Cir. 1993); *In re Grand Jury Subpoenas*, 926 F.2d 847, 856-58 (9th Cir. 1991); *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 959-62 (3d Cir. 1984); *National City Trading Corp. v. United States*, 635 F.2d 1020, 1025-26 (2d Cir. 1980); *In re Search Warrant for Law Offices*, 153 F.R.D. 55 (S.D.N.Y. 1994).

critical commentary,^{4/} Department of Justice Guidelines,^{5/} and legislative action.^{6/}

Prosecutors usually avoid unnecessary intrusion on confidential communications by issuing a grand jury subpoena to the client or, in extraordinary circumstances, to the attorney. A grand jury subpoena permits the subpoena recipient to apply to the court for a protective order, ensuring that judicial review will occur before any assertedly privileged material must be produced. *E.g., United States v. Zolin*, 491 U.S. 554 (1989). Under some circumstances, however, law enforcement officials may legitimately conclude that they must proceed by search warrant to avoid destruction or concealment of critical evidence. Because of the risk that the searching officers will view privileged communications, the decision to proceed by warrant and the manner of conducting the search require careful oversight by the court issuing the warrant and the utmost good faith by the executing officials.

^{4/} *See, e.g.,* Martin G. Weinberg & Kimberly Homan, *Challenging the Law Office Search*, *The Champion*, Aug. 1996, at 10; Michael S. Pasano, *A Search for Justice? Ensuring Due Process in Law Office Searches*, 10 *Crim. Just.* 42 (1995); Lackland H. Bloom, *The Law Office Search: An Emerging Problem and Some Suggested Solutions*, 69 *Geo. L.J.* 1 (1980); Steven J. Enwright, *Note: The Department of Justice Guidelines to Law Office Searches: The Need to Replace the "Trojan Horse" Privilege Team with Neutral Judicial Review*, 43 *Wayne L. Rev.* 1855 (1997).

^{5/} U.S. Department of Justice Guidelines, Oct. 11, 1995, *reprinted in* 58 *Crim. L. Rep.* 2007 (BNA 1995).

^{6/} *See, e.g.,* 42 U.S.C. § 2000aa-11(a)(3); Cal. Penal Code § 1524.

This case reflects a complete absence of that essential good faith. Prosecutors Conn and Najera initially issued a subpoena to Ms. Baker, but refused to extend the return date so that Gabbert could obtain judicial review of Ms. Baker's Fifth Amendment privilege claim. When Gabbert and Ms. Baker appeared in response to the subpoena, Conn and Najera delayed Ms. Baker's testimony until they could obtain a search warrant for Gabbert. Conn misrepresented the purpose for the delay in Ms. Baker's appearance; he told Gabbert that he was preparing an immunity letter for Ms. Baker, when he and Najera actually were obtaining the search warrant. Conn and Najera then caused the warrant to be served on Gabbert at the same moment they called Ms. Baker before the grand jury.

As the Ninth Circuit observed, "The prosecutors were in control of both events: they controlled the timing of the execution of the search warrant on Gabbert and his client's grand jury appearance. The only apparent reason to have both occur at the same time was the prosecutors' desire to prevent Gabbert from communicating with his client." *Gabbert v. Conn*, 131 F.3d 793, 802 (9th Cir. 1997). The court added that "[t]he plain and intended result was to prevent Gabbert from consulting with Baker during her grand jury appearance." *Id.* at 802-03. Compare *In re Grand Jury Subpoenas*, 926 F.2d 847, 858 (9th Cir. 1991) (finding law office search to be "a model of government sensitivity to the special privacy interests that are implicated when a law firm's files must be searched," in part because "[t]he Government intentionally timed the search for a time of day when it would least disrupt the law firm's activities").

Apart from interfering with Gabbert's representation of his client, the search posed additional dangers. The initial search, conducted in the courthouse by a special master, intruded directly into privileged communications between

Gabbert and three of his clients, in violation of the California statute that governs searches of lawyers. Cal. Penal Code § 1524. Gabbert's efforts to protect these privileged communications, as he was required to do, Cal. Bus. & Prof. Code § 6068(e), distracted him from his representation of Ms. Baker. Then, in "flagrant disregard of statutory norms and the plain requirements of the warrant itself," *Gabbert*, 131 F.3d at 805, the prosecutors caused a detective to conduct a *second* search of Gabbert and his briefcase. And the prosecutors caused these searches to occur in the vicinity of Ms. Baker, a tactic certain to intimidate her and to erode her confidence in her lawyer.

Petitioners attempt to play down their abuse of power. They assert, for example, that Gabbert was "temporarily distracted from providing legal assistance to his client, due to the execution of a valid search warrant," Pet. Br. 9, and they warn that under the Ninth Circuit's decision "any time the government executed a search warrant on a person who was either engaged in his occupation or simply on the way to his job or place of business, the government would be in violation of the person's fourteenth amendment rights," Pet. Br. 10. But this case does not merely involve the "temporary distraction" that, for example, a cabdriver or an accountant might suffer while searched. This case involves the deliberate manipulation of a search warrant to skew the balance of power between the government and a citizen (Ms. Baker) by entangling her advocate (Gabbert) in a patently illegal search^{2/} that forced him simultaneously to consider his own interest in privacy, the

^{2/} The Ninth Circuit noted the special master's "apparent disregard for the plain requirements of Cal. Penal Code § 1524" during the first search, and it found that the second search was conducted in "flagrant disregard of statutory norms and the plain requirements of the warrant itself." *Gabbert*, 131 F.3d at 805-06.

confidentiality of his client files as the special master searched them, and Ms. Baker's need for representation as she appeared before the grand jury.

III. THE IMPORTANCE OF PROVIDING REPRESENTATION TO A CLIENT TESTIFYING BEFORE A GRAND JURY.

As the Ninth Circuit noted, prosecutors Conn and Najera timed the search of attorney Gabbert to coincide with Ms. Baker's appearance before the grand jury. They did so knowing that Ms. Baker intended to assert her Fifth Amendment rights. By questioning Ms. Baker when Gabbert could not advise her, the prosecutors plainly intended to induce her to make a damaging admission or to forfeit her privilege against self-incrimination.

The prosecutors' tactics were especially pernicious in light of the importance of legal advice when a witness testifies before the grand jury. In California as in many jurisdictions, a grand jury witness appears alone. Her counsel cannot enter the grand jury room. See Sara S. Beale & William C. Bryson, *Grand Jury Law and Practice* §§ 6:18, 6:19 (Callaghan 1986). Alone, the witness (who usually has no legal training) must face questioning from skilled prosecutors. In this one-sided, inherently intimidating setting, a witness must depend for protection on her right to leave the grand jury room and consult counsel. See, e.g., *United States v. Mandujano*, 425 U.S. 564, 581 (1976); *Gabbert*, 131 F.3d at 801.

Even when the questioning involves solely factual matters, a grand jury witness may need to consult counsel. But when--as here--the witness may be a target of the grand jury and intends to assert her Fifth Amendment privilege, the advice of counsel is essential. A response to a seemingly innocuous

question can turn out to be incriminating, and answers to broad questions may forfeit the privilege as to underlying details. E.g., *Brown v. United States*, 356 U.S. 148 (1958). A witness needs the guiding hand of counsel to avoid these pitfalls. And it is the duty of counsel representing a witness before the grand jury to consult with the client as such issues arise. See, e.g., National Lawyers Guild, *Representation of Witnesses Before Federal Grand Juries* § 6.5 (3d ed.); *California Criminal Law, Procedure and Practice* §§ 8.11-8.14 (Continuing Education of the Bar, Berkeley 2d ed.).

Prosecutors Conn and Najera deliberately thwarted Gabbert's performance of his duty to advise Ms. Baker. The prosecutors knew that Ms. Baker would attempt to assert her Fifth Amendment rights; indeed, as a ruse to gain time to obtain the search warrant, Conn had spoken with Gabbert about furnishing Ms. Baker with informal immunity. The prosecutors knew that Gabbert had accompanied Ms. Baker so that he could consult with her outside the grand jury room about her assertion of the privilege. Knowing these facts, the prosecutors caused the search warrant to be executed upon Gabbert, summoned Ms. Baker before the grand jury, and began questioning her. The prosecutors' improper tactic had its intended effect: Gabbert, preoccupied with the special master's unlawful effort to examine files containing privileged communications, could not give Ms. Baker the advice she sought.

Two hypotheticals that petitioners offer to illustrate the alleged consequences of the Ninth Circuit's opinion in fact demonstrate the wrongfulness of their conduct. First, petitioners assert that under the court of appeals' decision, an attorney representing a grand jury witness could sue the bailiffs operating the metal detector at the courthouse if their routine search caused the attorney to miss his client's appearance. Pet. Br. 24. Nothing in the opinion below would support such a far-

fetch claim. But suppose the facts are changed to resemble this case. Suppose that the prosecutors directed the bailiffs to prolong their search of the attorney beyond their normal practice to prevent him from representing his client. Suppose further that the prosecutors, knowing that the bailiffs had detained the attorney at the prosecutors' direction, then called the client before the grand jury and began questioning her, intending to exploit the attorney's absence. Under these circumstances--closely analogous to this case--the attorney would surely have a due process claim against the prosecutors.

Second, petitioners assert that the Ninth Circuit's decision would support a claim against police officers manning a roadblock if the roadblock caused an attorney to be late to court and thus to lose a case. Pet. Br. 24-25. Again, nothing in the court of appeals' decision would support such a claim. But suppose that prosecutors conducting grand jury proceedings knew that a witness intended to appear with counsel and assert the Fifth Amendment privilege and further knew that counsel would follow a particular route to the courthouse. Suppose as well that the prosecutors instructed the police to set up a roadblock on that route to intercept the attorney. And suppose that the prosecutors waited until police notified them that the attorney had been detained at the roadblock, and then called the witness before the grand jury to begin questioning her. Here, too, the attorney should have a claim against the prosecutors for interference with his right to practice his profession.

As the Ninth Circuit aptly noted, "The prosecution and defense of criminal allegations produce ample opportunity for adversarial conflict." *Gabbert*, 131 F.3d at 797. Increasingly in recent years, those "adversarial conflicts" have taken the form of prosecutorial efforts to prevent defense counsel from representing their clients zealously. Too often courts view those efforts in isolation, in the context of a single case in which the

defendant may stand accused of a heinous crime. It may be tempting in such cases to treat the prosecutorial misconduct as an unsavory means to reach a just end. Taken in the aggregate, however, the misconduct of individual prosecutors in particular cases chills the determination of every defense attorney to confront the government's case vigorously. By thus deterring counsel from performing their constitutional function, individual acts of misconduct--such as the misconduct that Conn and Najera committed against Gabbert and Ms. Baker--corrupt our system of criminal justice.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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